



**MODEL BENCHBOOK**

**ON THE RIGHTS OF PERSONS**

**WITH DISABILITIES**

**IN CRIMINAL PROCEEDINGS**

### About the ENABLE project and the Model Benchbook

The Model Benchbook on the Rights of persons with disabilities in Criminal Proceedings was drafted by the International Commission of Jurists, within the [ENABLE project](#), implemented in eight EU countries and coordinated by the Validity Foundation. The project seeks to promote access to justice and fairer criminal proceedings for defendants with intellectual and psychosocial disabilities in Bulgaria, the Czech Republic, Lithuania, Portugal, Romania, Slovakia, Slovenia and Spain. As one of the main deliverables of the project, the Model Benchbook thoroughly analyses the relevant international and regional human rights standards on procedural accommodations for defendants with intellectual and psychosocial disabilities within criminal proceedings, providing also practical guidelines for their implementation. The content of this Benchbook is based on research conducted in the ENABLE project on barriers to implementing procedural and fair trial rights during the pre-trial and trial phases of proceedings, and it served as a foundation for national disability rights benchbooks, developed by partner organisations in the mentioned above countries.

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### Authors

Karolína Babická, Cristina Giacomini, Tim Fish and Ian Seiderman

### Bench Book Development Team

Ion Schidu, Bruno Monteiro, Steven Allen, Temur Shakirov and Charoula Papastefanaki

### Project contacts

Validity Foundation – Mental Disability Advocacy Centre  
Impact Hub, Milestone Institute  
Budapest, Wesselényi utca 17.  
1053 Budapest, Hungary  
E-mail: [validity@validity.ngo](mailto:validity@validity.ngo)

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# EXECUTIVE SUMMARY

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## Why there is a need for a Bench Book?

Irrespective of whether they are victims of, witnesses to or alleged perpetrators of crime, persons with intellectual and psychosocial disabilities have significant difficulties in accessing justice and engaging with justice actors, including police officers, lawyers, prosecutor authorities and judicial officers. It is for this reason that the UN Convention on the Rights of Persons with Disabilities (CRPD) entrenches several rights and places significant obligations on states to take proactive measures to ensure that accommodations are in place to ensure that all persons with disabilities can access all justice processes and procedures.

The research carried out within the ENABLE project shows that while the ratification of the CRPD by the European Union (and all its Member States, without reservations) places obligations on EU to identify and eliminate obstacles or barriers and put in place systemic measures to ensure that all persons with disabilities can equally exercise their right to access to justice, the relevant EU Directives remains silent on the specific needs and barriers of persons with intellectual and psychosocial disabilities.

At the same time, national laws do not recognise the legal capacity and standing of individuals with psychosocial and intellectual disabilities, omit to detect the disability and provide the needed support to access information and communicate. Outdated laws, equally, do not recognise the right to procedural accommodations. Further, defendants with intellectual and psychosocial disabilities lack access to effective legal advice and often experience attitudinal barriers of the criminal justice actors, including due to the very little knowledge they have about disability, disability rights and very little information about how they should engage with persons with disabilities.

Despite these setbacks, we see that in all assessed countries CJA tend to provide some support measures to participants in criminal proceedings with intellectual and psychosocial disabilities. Often, making analogy to the legal frameworks providing support measures for people with hearing, sensory or physical disabilities, as well as victims with intellectual and psychosocial disabilities – or simply guided by common sense and intuition - CJA use plain language, speak at a slower pace, and take breaks between phrases to allow information to process. Additionally, they work with specialised non-governmental organisations to evaluate the need for accommodations and allow family members to assist individuals with intellectual and psychosocial disabilities during the criminal justice process.

While judges, prosecutors, lawyers, law enforcement officers, and other professionals in the field are the primary audience for the Bench Book, it will also be helpful to members of the general public, including DPOs, individuals with disabilities, and their families who are interested in or involved in legal proceedings, including in civil cases. They will learn best practices for ensuring effective participation of individuals, including defendants, with intellectual and psychosocial disabilities, in legal proceedings, as well as practical steps for national implementation.

### Rights of persons with disabilities – International legal framework

The CRPD is regarded as a key instrument in the international legal framework governing the rights of people with disabilities. These are the most important obligations that CJAs from all states that ratified the CRPD must ensure for all persons with disabilities participating in legal proceedings:

- prohibit all discrimination on the basis of disability and guarantee equal and effective legal protection against discrimination on all grounds
- ensure that the right to stand trial are recognised to all persons with disabilities, at all levels of the criminal justice system, without discrimination.
- provide the necessary support to enable persons with disabilities to make decisions that have legal effect and that respect the rights, will and preferences of these persons.
- promptly identify and recognise the barriers and the appropriate support measures to enable an effective participation in proceedings of a person suspected or accused in criminal proceedings
- take measures to provide gender and age-appropriate individualized procedural accommodations, according to the will and preference' of the person. Accommodations should be organised before the start of proceedings, and participants should be kept informed of their availability throughout.
- have access to legal notices and information in a timely and accessible manner on an equal basis with others, and that information about justice systems and procedures,

- ensure that persons are informed of their rights orally or in writing, in accessible language, considering any particular needs and barriers
- ensure that suspects or accused persons who do not speak or understand the language of the criminal proceedings are provided with effective, accurate and impartial interpretation
- provide free or affordable legal assistance, that is competent and timely and ensure that lawyers have access to procedural accommodations
- ensure that suspects and accused persons have the right to be present at their trial and that their right to presumption of innocence is fully guaranteed

The greater part of these rights, including the right to information, right to interpretation and translation, right of access to a lawyer and legal aid are also protected within the European Union by relevant EU legislation,

### Implementation of procedural rights in practice: recommendations

**Right to equal recognition before the law** necessitates authorities, including CJA, to recognize and assume the full legal capacity and right of defendants with disabilities to participate in all stages of the proceedings and in all courts, this includes:

- a. Ensure that defendants who have been previously declared to be without legal capacity to participate in court proceedings have the right to appeal or otherwise seek restoration of their legal capacity
- b. If a defendant with a disability lacks the necessary intent within the usual meaning of the term, the defendant should be treated the same way as any other defendant who lacks intent
- c. Provide persons with disabilities the support and accommodations necessary to exercise their legal capacity. For more example, please see below.

**Right to procedural accommodations.** States must provide gender and age-appropriate individualized procedural accommodations. CJA should:

- a. Identify accommodation needs at the beginning of proceedings. The defendants should be involved in the development of the individual assessment, should receive it when finalised and should have the right to comment on it, with communication and other support as necessary.

- b. Consult persons with disabilities about their accommodation needs. A disclosure from an individual that they have a disability is enough to place an obligation on the authorities to make a full determination, taking into account the individual's views.
- c. It should not be the sole responsibility of the defendant to request the accommodations. All justice actors have a proactive duty to initiate the provision of accommodations.
- d. Prepare accommodations before hearings/trials.
- e. Make defendants aware of their right to accommodations and that it can be requested at any time.
- f. Provide intermediaries for defendants with disabilities for communication assistance
- g. Allow individuals to choose their support person. Do not assume that the support person will necessarily be a family member or that a person with disability will necessarily want to make use of a support person
- h. Ensure the support person's presence throughout proceedings and allow face-to-face contact with the support person
- i. Ensure venue accessibility, including by limiting exposure to others when necessary, adapting seating and positioning as needed, and creating a non-intimidating environment by removing formal attire.
- j. Adapt language to individual needs. Specifically, the following has to be considered: Speed and tone of delivery, level of vocabulary, level of grammar, complexity of questions, ability to narrate independently, questions related to time, orientation and distance, level of literacy. Ensure the pace of the proceedings is well adjusted – ensure for instance rather short sessions, frequent breaks.
- k. After the meeting, confirm important dates and actions to make sure they have been written down correctly.
- l. Be aware of any indications of stress, discomfort, fatigue, or diminished concentration as the proceedings unfold
- m. Adopt a comprehensive procedure for recognising, requesting, assessing, and providing individual support for persons with disabilities
- n. Relevant actors must cooperate to establish a more uniform and efficient framework for providing appropriate procedural accommodations for defendants with disabilities. Efficient coordination is necessary among the agents of justice at the state, regional, and local levels

**Right to information and communication in accessible formats** includes also right to communication and right to interpretation and translation. Among the most important recommendations are the following:

- a. Present information in simplified, understandable formats such as leaflets, ensuring it aligns with the defendant's specific communication needs.
- b. Avoid using legal jargon and legalistic use of language.
- c. Ascertain if individuals with disabilities fully understand their rights and the legal procedures involved the right not to incriminate themselves and the available organizational support
- d. When asking questions:
  - signpost when moving to new topics ('We will now discuss...').
  - break down questions into separate elements.
  - avoid idiomatic language, hypothetical or abstract questions, or suggesting the answer in question.
- e. At all stages of the proceedings ensure that all court processes provide the technical and other support necessary for defendants with disabilities to use any form of communication as necessary for their full participation, including: assistive listening systems and devices, open, closed and real-time captioning, and closed caption decoders and devices, voice, text and video-based telecommunications products, etc.
- f. Provide communication support, including through third-parties, for example: note-takers, qualified sign language and oral interpreters, relay services, etc.
- g. Provide CJA with communication tools to use in communication with persons with disabilities. For instance: the AAC pictograms browser, a "communication board", and easy to read guidelines

**Right to access to a lawyer and legal aid.** It has been shown that lawyers are often the only persons capable of ensuring that defendants with disabilities have their interests safeguarded. Among the most important recommendations for CJA to ensure the right to access to a lawyer and legal aid are the following:

- a. Provide defendants with disabilities legal aid upon initial contact with law enforcement, irrespective of the alleged offense, under terms no less favourable than those for individuals without disabilities.
- b. The presence of the same lawyer at every stage of the proceedings is highly preferable

- c. Inform defendants of their entitlement to legal representation and the right to legal aid and other possibilities, such as to access representation through civil society organizations.
- d. Facilitate procedural accommodations, such as interpreters and assistive technology, to enable effective communication of lawyers with defendants with disabilities.
- e. Ensure effective access to a lawyer for detained individuals, including those under compulsory medical measures or detention.
- f. Ensure proactive engagement and regular contact between lawyers and clients, overseen by national Bar Associations to uphold quality standards.
- g. When is in custody, or there is any risk of a legal proceeding leading to their detention, there is a particular urgent need for them to have effective access to a lawyer and legal aid
- h. Provide lawyers with basic training on the rights of persons with disabilities.

**Right to be present at trial and the right to presumption of innocence.** To ensure access to justice, defendants with disabilities must be able to attend the trial, have the necessary procedural accommodations to participate effectively, and be presumed innocent. To effectively implement the right to be present at trial, CJA must take into consideration the following recommendations:

- a. Respect the right of defendants with disabilities to be present at trial and defend themselves in person, including by:
  - applying exceptions to the right to be present at trial equally for persons with disabilities, and
  - adapting courtroom settings to minimize intimidation, such as removing formal attire like wigs or cloaks and ensuring a less formal atmosphere.
- b. Assess the suitability of remote hearings for individuals with disabilities, prioritizing their will and preferences, including through:
  - ensuring access to procedural accommodations in remote hearings, including the involvement of intermediaries and communication support through note-takers, sign language interpreters, and relay services.
  - clarifying the roles of participants in remote hearings, ensuring understanding for defendants with disabilities.

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- adjusting the pace of proceedings by scheduling shorter sessions and frequent breaks to accommodate the needs of defendants with disabilities.
- c. Consider that remote hearings will not be suitable in every instance. When managing a remote hearing:
- determine if the individual will have support or be alone during the hearing.
  - address any potential disruptions beforehand. For example, breaks, connection loss, or interruptions.
  - introduce everyone at the start and proceed slowly.
  - customize the display screen to optimize visibility, considering who should be shown and in what size.
  - pin certain faces to the screen for consistency.
  - check regularly if the individual is following.
  - establish a signal for the individual to indicate when they don't understand or want to speak.

# 01

## INTRODUCTION

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## A. About this Bench Book

Irrespective of whether they are victims of, witnesses to, or alleged perpetrators of crime, persons with disabilities have significant difficulties in accessing justice and engaging with justice actors, including police officers, lawyers, prosecutorial authorities, and judicial officers.<sup>1</sup> It is for this reason that the Convention on the Rights of Persons with Disabilities (CRPD) entrenches and protects a number of specific rights and places concrete obligations on States to take proactive measures to ensure that accommodations are in place to ensure that all persons with disabilities can access all justice processes and procedures.

Though all persons with disabilities will typically face some barriers in accessing justice, individuals with psychosocial and intellectual disabilities, in particular, face severe exclusion from participation in justice processes as a result of outdated laws which strip them of legal capacity entirely, as well as a lack of procedural accommodation that would respond to their specific needs.<sup>2</sup> As a result, many persons, especially those that participate in criminal processes as defendants, are forcibly medicated and/or institutionalized, without their consent, sometimes for long periods of time and under conditions that have been found to constitute torture or cruel, inhuman or degrading treatment under IHRL.<sup>3</sup> As detailed below, such treatment, even where it falls short of proscribed ill-treatment, violates a wide range of rights protected in the CRPD.

For justice actors, including judges, the situation and circumstances of persons with disabilities can be difficult to understand and appropriately respond to. By and large, most justice actors have very little knowledge about disability, disability rights, and how they should engage with persons with disabilities.<sup>4</sup>

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<sup>1</sup> UN, Special Rapporteur on the Rights of Persons with Disability, *International Principles and Guidelines on Access to Justice for Persons with Disabilities* (2020), Introduction pages 6-7.

<sup>2</sup> Validity Foundation, [Fair Trial Denied: Defendants with Disabilities Face Inaccessible Justice in the EU](#), 2024.

<sup>3</sup> UN Committee on the Rights of Persons with Disabilities, *Guidelines on deinstitutionalization, including in emergencies* (2022) CRPD/C/5, para. 2, 6 and 120.

<sup>4</sup> KERA Foundation, [Briefing paper on barriers faced by defendants with intellectual and/or psychosocial disabilities in the Criminal Justice System in Bulgaria](#), Veliko Tarnovo, ENABLE Project, 2023, p. 5; Mental Health Perspective, [Briefing paper on barriers faced by defendants with intellectual and/or psychosocial disabilities in the Criminal Justice System in Lithuania](#), ENABLE Project, 2023, pp. 18-19; Plena Inclusión, [Briefing paper on barriers faced by defendants with intellectual and/or psychosocial disabilities in the Criminal Justice System in Spain](#), Madrid, ENABLE Project, 2023, p. 6.

As the former UN Special Rapporteur on the Rights of Persons with Disabilities noted, like justice actors, typically “justice systems reflect the values of the societies in which they are embedded.”<sup>5</sup>

This is one of the reasons why the CRPD more generally obliges States to “adopt immediate, effective and appropriate measures” to “raise awareness throughout society” about disability, “foster respect for the rights and dignity of persons with disabilities” and “combat stereotypes, prejudices and harmful practices relating to persons with disabilities.”<sup>6</sup> Critically, the CRPD requires States - meaning effectively State agents participating in the administration of justice - to promote “awareness of the capabilities and contributions of persons with disabilities” to society, as well as recognition of the “skills, merits and abilities of persons with disabilities.”<sup>7</sup>

### **The scope of this Bench Book**

The primary audience for this Bench Book<sup>8</sup> is judges, prosecutors, lawyers, law enforcement officers, and other professionals (broadly referred to as “justice actors”),

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<sup>5</sup>UN, Special Rapporteur on the Rights of Persons with Disability, International Principles and Guidelines on Access to Justice for Persons with Disabilities (2020) Background p. 5.

<sup>6</sup> CRPD, Article 8:“1. States Parties undertake to adopt immediate, effective and appropriate measures:

(a) To raise awareness throughout society, including at the family level, regarding persons with disabilities, and to foster respect for the rights and dignity of persons with disabilities;

(b) To combat stereotypes, prejudices and harmful practices relating to persons with disabilities, including those based on sex and age, in all areas of life;

(c) To promote awareness of the capabilities and contributions of persons with disabilities.

2. Measures to this end include:

(a) Initiating and maintaining effective public awareness campaigns designed:

(i) To nurture receptiveness to the rights of persons with disabilities;

(ii) To promote positive perceptions and greater social awareness towards persons with disabilities;

(iii) To promote recognition of the skills, merits and abilities of persons with disabilities, and of their contributions to the workplace and the labour market;

(b) Fostering at all levels of the education system, including in all children from an early age, an attitude of respect for the rights of persons with disabilities;

(c) Encouraging all organs of the media to portray persons with disabilities in a manner consistent with the purpose of the present Convention;

(d) Promoting awareness-training programmes regarding persons with disabilities and the rights of persons with disabilities.”

<sup>7</sup> Ibid <sup>6</sup>

<sup>8</sup> Bench Books have a significant role in many common law countries including the UK<sup>8</sup>, the US<sup>8</sup>, and Australia<sup>8</sup> and can constitute a useful tool and a ready and accessible resource also in other legal systems.

A benchbook is a practical guide for judges and justice actors and it usually addresses specific tribunals or focuses on specific issues. Benchbooks clarify to judges what they should do with practical problems, common practices, and procedures, and how they should do that. See: Livingston Armytage, *Developing Bench Books for Tribunals - Some Guidelines* (2003) Centre for Judicial Studies available at [6TH ANNUAL AIJA TRIBUNALS CONFERENCE \(centreforjudicialstudies.com\)](https://www.centreforjudicialstudies.com). See Examples of Benchbooks in the UK, in the US and in Australia: UK’s Equal Treatment Bench Book available at [Equal Treatment Bench Book \(April 2023 revision\) \(judiciary.uk\)](https://www.judiciary.uk); Adult Court Bench Book and Pronouncement Bilder available at [Adult Court Bench Book \(May 2023\) \(judiciary.uk\)](https://www.judiciary.uk). Bench Book for US District Court Judges available at [Benchbook for U.S. District Court Judges, Sixth Edition \(fjc.gov\)](https://www.fjc.gov); Military Judge’s Bench Book available at [jagcnet.army.mil/EBB/](https://www.jagcnet.army.mil/EBB/). Australian Disability Access Book available at [Disability Access Bench Book \(judicialcollege.vic.edu.au\)](https://www.judicialcollege.vic.edu.au); National Domestic and Family Violence Bench Book available at [Contents - National Domestic and Family Violence Bench Book \(aija.org.au\)](https://www.aija.org.au).

primarily based in the EU and working in criminal legal settings, to provide access to justice for all persons, including persons with disabilities.

While the focus of this Bench Book is on criminal justice settings, the law and standards and recommendations contained in it may be helpful to justice actors in broader contexts including in civil proceedings. In particular, there are often overlaps between how legal systems approach the questions of “legal capacity” and “substituted decision making” in both criminal and civil contexts. While not exactly the same, the core principles set out by IHRL and standards apply in all justice settings. For example, the CRPD sets out some principles that apply in both civil and criminal proceedings. Article 3 CRPD recognizes the individual autonomy of persons with disabilities as an overarching general principle of the Convention. Article 12 CRPD recognizes the legal capacity of all persons with disabilities. Article 13 CRPD provides for their right to have effective access to justice. Legal capacity is also recognized by Principle 1 of the UN Principles and Guidelines on Access to Justice for Persons with Disabilities and further developed by the Committee on the Rights of Persons with Disabilities in its jurisprudence. These principles fundamentally require the following approach: respect for the autonomy of persons with disabilities through the provision of necessary support required to participate fully and on an equal basis with all others in all justice procedures and processes. The early identification of a person’s disability constitutes an essential step to guarantee access to justice and fair trial from their first interaction with law enforcement and legal systems and processes more generally.

### **Summary of the challenges**

In addition to attitudinal and systemic barriers, various other types of barriers impact persons with disabilities access to justice: legal, practical, physical, environmental, economic, and information and communication barriers. Many of these kinds of barriers – and appropriate responses by justice actors to eliminate them – are detailed in this Bench Book. Indeed, the experience of many persons with disabilities is that they encounter “secondary victimization”<sup>9</sup> when they attempt to enforce their rights through legal processes and procedures, including courts.

The rights of persons with disability, like all human rights are universal, and EU Member States, like all States are bound by International Human Rights Law (IHRL).

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<sup>9</sup> “Secondary victimization is victimisation that occurs not as a direct result of the criminal offence but as a result of the response of public or private institutions and other individuals to the victim.” See: Council of Europe, Recommendation CM/Rec(2023)2 of the Committee of Ministers to member States on rights, services and support for victims of crime, CM/Rec(2023)2, 2023, definition of secondary victimization.

They have additional obligations under EU law. Existing laws and policies detailing Member States duties towards persons with disabilities in the justice system, including persons suspected or accused of a crime, are frequently non-compliant with Member States international human rights obligations.

In many EU Member States, the approach of the criminal justice system towards perpetrators remains highly punitive in nature. The approach to persons with disabilities, in particular, is also based on a high level of stigma and prejudice both in society at large and from justice actors, and constitutes a significant obstacle to access to justice for defendants with disabilities.<sup>10</sup>

Although EU Member States' legal frameworks often substantially cover procedural rights, including the rights to legal representation and to information and interpretation, access to justice for defendants with disabilities remains severely limited. There is a lack of specialization and training among the justice actors on the rights of persons with disabilities. Public defenders are often not disability conscious or disability sensitive, which contributes to the non-recognition of disability and the exclusion of persons with disabilities from effectively using their services. Persons with disabilities are therefore often compelled to opt for the appointment of private counsel<sup>11</sup>.

In many EU countries, the legal framework does not specifically include procedural accommodations for persons with disabilities.<sup>12</sup> Nor do such legal frameworks provide for specific accommodations for accused or defendants with intellectual and/or psychosocial disabilities, in particular. For instance, legal frameworks in many EU countries often do not guarantee the possibility of the use of an intermediary in order to support the communication and decision-making of persons with intellectual and/or psychosocial disabilities involved in court proceedings.<sup>13</sup> This has a serious impact on the right of defendants with disabilities to participate in court processes and curtails their right to legal capacity significantly.

Many criminal justice systems in the EU Member States include ableist aspects that directly conflict with International Human Rights Law and standards such as: insanity defences, tests to determine capacity to stand trial, compulsory or forced medical

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<sup>10</sup> Validity Foundation, [Fair Trial Denied: Defendants with Disabilities Face Inaccessible Justice in the EU](#), 2024.

<sup>11</sup> Ibid. 4.

<sup>12</sup> For instance in the Czech Republic, Lithuania, Romania, Slovenia and other countries. See: Czech Criminal Procedure Code, Act no. 141/1961 Coll., on Criminal Procedure, 1961; Lithuanian Code of Criminal Procedure, Document No. IX-785, 2002; Romanian Criminal Procedure Code, Law 135 of 1 July 2010, 2010; Slovenian Criminal Procedure Act, Law 176/21, 1994.

<sup>13</sup> Ibid. 12.

treatment (including detention in psychiatric hospitals), and other forms of institutionalization.

The UN Convention on the Rights of Persons with Disabilities (CRPD), which was ratified by the European Union and all its Member States without reservations, places significant obligations on States to identify and eliminate obstacles or barriers and take proactive, systemic measures to ensure that all persons with disabilities can benefit in an equal manner from their right to access to justice. Nevertheless, although the relevant EU Directives and Member States' legal frameworks recognize the need for support and protect these rights of persons with hearing, sensory or physical disabilities, the legislation of the researched States<sup>14</sup> remains largely silent on the specific needs of persons with intellectual and psychosocial disabilities.

These legislative gaps persist despite the fact that very often similarly specialized measures are provided for in respect of other groups in vulnerable situations that may require similar types of assistance throughout the criminal process, such as minors or women who are victims of domestic or sexual violence. For those few States that have put in place support mechanisms, the measures extend only to persons with intellectual and psychosocial disabilities that participate in proceedings as victims, without providing similar protections for persons with disabilities who participate in other manners in legal processes.

This Model Disability rights benchbook was drafted by the International Commission of Jurists as part of the Enable project, led by the Validity foundation and using information and research from national partners in eight EU Member States: Bulgaria, the Czech Republic, Lithuania, Portugal, Romania, Slovakia, Slovenia and Spain. It served as a basis for the development of national benchbooks, each tailored to each national jurisdiction.

The Benchbook was researched and written by Karolína Babická and Cristina Giacomini, legal review was provided by Tim Fish and Ian Seiderman.

Additional contributions were provided by Ion Schidu, Bruno Monteiro, Steven Allen, Temur Shakirov and Charoula Papastefanaki.

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<sup>14</sup> The countries researched as part of the current project were: Bulgaria, the Czech Republic, Lithuania, Portugal, Romania, Slovakia, Slovenia, Spain.

## **B. Understanding disability**

As will be more fully detailed below, it is crucial, from the outset, to clarify how disability is understood in terms of IHRL, and, therefore, how States are bound to understand disability in the context of their own legal systems. Briefly, disability is no longer understood as restricted to a medicalized understanding of a condition, disease, or other “impairment” located in the body of a person with a disability. Instead disability is more accurately understood as being produced by the interaction between such an “impairment” and the reality faced by persons with disabilities in society, which includes, legal, social, environmental, attitudinal and other barriers.

Disabilities are sometimes described in categories. The CRPD itself describes disability as an “evolving concept” and indicates that, among others persons with disabilities include “those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others.”<sup>15</sup> Identifying disabilities can be a complex process. Though a national legal system may attempt to define different “categories” of disabilities and various levels of assistance to realise rights, what is most important is not identifying and categorizing a person (or a group of persons), but an individual’s specific disabilities, needs and rights.

What is important to understand is that different individuals have different disabilities and experiences of disability. Justice actors therefore cannot adopt a one-size-fits-all approach to the accommodations and support provided to persons with disabilities in general or any single category of persons with disabilities in particular. To do, so not only falls short of legally binding IHRL, but may well compound or deepen

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<sup>15</sup> CRPD, Preamble, (e).

discrimination against an individual with a disability, instead of providing the support that justice actors have the obligation to provide.<sup>16</sup>

This Bench Book places significant focus on individuals with disabilities, especially those with psychosocial disabilities, intellectual disabilities, persons with autism and persons with dementia. The reason for this is that, as indicated by the UN Special Rapporteur on the Rights of Persons with Disabilities, individuals with this range of disabilities experience “particularly acute” problems of discrimination based on the denial of legal capacity.<sup>17</sup> The same is true in relation to “disability-specific forms of deprivation of liberty” that are prevalent and often directly channelled through the criminal justice process.<sup>18</sup>

*[In Annex III. Understanding disability: Examples of impairments and possible adjustments](#), some examples of some common disabilities can be found for easy reference.*

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<sup>16</sup> Paragraph 25 of the CRPD General Comment No. 2 presents the example of persons with rare impairments or persons with disability who do not use the modes, methods, or means offered to achieve accessibility, like a blind person who does not know Braille.

<sup>17</sup> UN Human Rights Council, Report of the Special Rapporteur on the rights of persons with disabilities, UN Doc. A/HRC/37/56 (2017) available at <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G17/360/32/PDF/G1736032.pdf?OpenElement>, para 15.

<sup>18</sup> UN Human Rights Council, Report of the Special Rapporteur on the rights of persons with disabilities, UN Doc. A/HRC/40/54 (2019) available at <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G19/005/03/PDF/G1900503.pdf?OpenElement>, para 23.

## C. Key messages

At the outset, it may be helpful to set out key messages this Bench Book intends to convey.

**Binding legal standards:** States, including judiciaries and other justice actors, carry a range of legal obligations to ensure access to justice for persons with disabilities in terms of binding regional and international treaties. A range of international and regional standards provide clear guidance on how these obligations should be complied with. Judges and justice actors must respect the obligations set out in the relevant international legal instruments.

**Autonomy:** Persons with disabilities have, like all persons, a right to autonomously make decisions about **when, how, or if** to participate in justice processes. Justice actors should place significant emphasis on allowing, as far as possible, ensuring the autonomy of persons with disabilities in all justice processes and procedures. While respect for autonomy is important for all persons, given the near ubiquitous experiences of persons with disabilities of having their autonomy undermined, ignored or overruled in justice systems, it is critical that persons with disabilities' will and preferences guide their interactions with justice systems. A will and preference approach, significantly, is fundamentally different from an approach which considers the "best interests" of persons with disabilities, because it places more emphasis on autonomy.

**Individuality:** Persons with disabilities are not a monolithic group. Firstly, there is a wide range of disabilities that individuals experience, each with unique impact on their ability to access justice. Secondly, disability is produced by the social effect of the interaction between individual impairment and the social and material environment.<sup>19</sup> Two persons, who seem to others to have the same disability, may not have identical

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<sup>19</sup> UN Committee on the Rights of Persons with Disability, General Comment No. 3 on women and girls with disabilities (2016) CRPD/C/GC/3, para. 5.

support needs. Thirdly, disability is only one component of any individual person, personality and identity – it is therefore important to fully understand how an individual’s disability interacts with other aspects of their identity (gender, race, religion, economic situation, age, etc.)<sup>20</sup> with the result that individuals may experience discrimination in different ways.

**Support:** In any interaction with persons with disabilities the judiciary and justice actors should have, as a primary focus, the goal of ensuring that individuals are able to get whatever support they need to participate fully and equally in all justice processes and procedures as an expression of their autonomy. Regimes, processes and procedures which seek to substitute such expression of autonomy with an alternative decision maker – whether a judge, a psychiatrist, a family member or any other individual or organization – are fundamentally contradicted by such an approach. The substituted decision-making system is still present in some States. In light of article 12 CRPD, these States shall make maximum effort to ensure respect for the autonomy of persons with disabilities.<sup>21</sup> However, the CRPD Committee clarifies that “the development of supported decision-making systems in parallel with the maintenance of substitute decision-making regimes is not sufficient to comply with article 12 of the Convention.”<sup>22</sup>

**Fair trial:** IHRL does not require persons with disabilities to be exempt from accountability for their actions, nor does it require leniency based on the mere existence of a disability. The equal enjoyment of rights by persons with disabilities may require different treatment in the form of reasonable and procedural accommodations. At the centre of the reason for the full protection of the rights of persons with disabilities is the need to secure and ensure the rule of law, equality before the law and fair trial and legal processes for victims, witnesses, accused and other participants in justice

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<sup>20</sup> <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G18/119/05/PDF/G1811905.pdf?OpenElement>, paras 3, 19-22.

<sup>21</sup> UN Committee on the Rights of Persons with Disabilities, General Comment No. 1 (2014) CRPD/C/GC/1, para. 16-19; N. Devia, J. Bickenbach, G. Stuckia, *Moving towards substituted or supported decision-making? Article 12 of the Convention on the Rights of Persons with Disabilities* (2011) ALTER European Journal of Disability research, pp. 253-254.

<sup>22</sup> UN Committee on the Rights of Persons with Disabilities, General Comment No. 1 (2014) CRPD/C/GC/1, para. 28.

processes. Persons with disabilities should be ensured the full and equal respect for their moral agency and therefore the full and equal ability to be held accountable for their actions after being given a fair and equal opportunity to participate in justice processes and procedures.<sup>23</sup>

**Deinstitutionalization:** Forced institutionalization and/or treatment on the basis of disability is inconsistent with the autonomy and rights of persons with disabilities. Making matters worse, individuals who are forcibly institutionalized on grounds of intellectual or psychosocial disabilities often do not receive helpful support or treatment in such institutions in which the conditions are often sufficiently poor so as to constitute torture and inhuman or degrading treatment.<sup>24</sup> In addition to segregating persons with disabilities from society without their consent, institutionalization frequently cannot be shown to be of any benefit to persons with disabilities or society. States are required to take immediate measures towards the deinstitutionalization of persons with disabilities.<sup>25</sup> Where outdated laws and practices still require justice actors to pursue processes leading towards or resulting in institutionalization (despite the clear obligation under international human rights law and standards to repeal such laws and abolish these practices), justice actors should participate in the application of such laws with extreme caution and with a strong presumption against institutionalization.

**Well-equipped justice actors:** Judges and other justice actors, are, in reality, in many, if not most contexts, not provided with adequate information and training to understand disability in general, disability rights and/or what is required for persons with disabilities to enjoy their right to equal access to justice. It is therefore critical, within all legal systems, that all judges and justice actors are provided with detailed information – and, where appropriate training - to allow them to properly implement their mandates. No

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<sup>23</sup> UN OHCHR, Right to access to justice under article 13 of the Convention on the Rights of Persons with Disabilities (2017) A/HRC/37/25, para. 33-39.

<sup>24</sup> UNSpecial Rapporteur on Torture, *Report on psychological torture and ill-treatment* (20 March 2020) A/HRC/43/49, available: <https://www.ohchr.org/en/documents/thematic-reports/ahrc4349-report-psychological-torture-and-ill-treatment>.

<sup>25</sup> CRPD Committee, Guidelines on deinstitutionalization, including in emergencies, CRPD/C/5 (2022).

## EXECUTIVE SUMMARY

amount of information and training will, however, cover every possible type of situation that justice actors may face in ensuring access to justice for persons with disabilities. Justice systems must be geared towards providing –and equipped to provide - the necessary support to justice actors on a continuous and case-by-case basis.

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## **D. The Bench Book Overview**

This Bench Book is aimed at informing and guiding criminal justice professionals on their role in making criminal proceedings accessible to defendants with disabilities, with a particular focus on persons with intellectual or psychosocial disabilities. It sets out the international legal framework governing the rights of defendants with disabilities rights in criminal proceedings and practical recommendations and aimed at improving access to justice and respect for the rights of persons with disabilities at all stages of criminal proceedings.

**Chapter II** - Rights of Persons with Disabilities: International and EU Legal Framework - provides an overview of the responsibilities of criminal justice actors under international and EU law and standards in respect of defendants with disabilities.

**Chapter III** – Access to Justice for Persons with Disabilities - provides an overview of the barriers that people with disabilities face in realizing their rights to access justice, especially as defendants.

**Chapter IV** – Procedural Rights of Persons with Disabilities at All Stages of the Administration of Justice - provides practical information on critical areas arising with the provision of the needed support to enable equal participation, which includes identification of disability and support needs, provision of procedural accommodations, and accessible information.

The Bench Book contains three annexes:

- Annex I.: Definitions and concepts
- Annex II.: Summary of the Practical guidance and systemic recommendations
- Annex III.: Examples of disabilities that might require procedural adjustments

# 02

**RIGHTS OF PERSONS  
WITH DISABILITIES –  
INTERNATIONAL AND EU  
LEGAL FRAMEWORK**

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Chapter II contains an overview of the main legal tools that guarantee the rights of persons with disabilities in the criminal justice system in the international and European contexts. The purpose of this chapter is to provide a description of the existing legal framework on the rights of persons with disabilities, before discussing barriers that they may face during the process.

## **A. International legal framework**

### **UN Convention on the Rights of Persons with Disabilities (CRPD)**

The leading instrument effectively governing the international legal framework on the rights of persons with disabilities is the UN Convention on the Rights of Persons with Disabilities (CRPD, the Convention).<sup>26</sup> The purpose of the Convention is to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity.<sup>27</sup>

One aim of the Convention is to effect a change of attitudes and approaches by State authorities, but also all social actors, to persons with disabilities. Rather than conceiving of persons with disabilities as “objects” of charity, medical treatment, and social protection, it instead adopts the premise that persons with disabilities are people who are rights holders capable of exercising those rights and making decisions for their lives, based on their free and informed consent, as well as being active members of society.<sup>28</sup>

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<sup>26</sup> The CRPD Convention entered into force on 3 May 2008. It is the first comprehensive human rights treaty to be open for signatures by regional integration organizations. The CRPD was adopted on 13 December 2006 and was opened for signature on 30 March 2007. There were 82 signatories to the Convention, which was the highest number of signatories in history to a UN Convention on its opening day. United Nations Department of Economic and Social Affairs. “Convention On The Rights Of Persons With Disabilities (CRPD).” Accessible [here](#).

<sup>27</sup> UN General Assembly, Convention on the Rights of Persons with Disabilities : resolution / adopted by the General Assembly, 24 January 2007, A/RES/61/106, article 1, available [here](https://www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/A_RES_61_106.pdf) [https://www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/A\\_RES\\_61\\_106.pdf](https://www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/A_RES_61_106.pdf).

<sup>28</sup> See: United Nations Department of Economic and Social Affairs. “Convention On The Rights Of Persons With Disabilities (CRPD).” According to Article 33 CRPD (National implementation and monitoring), States Parties shall designate one or more focal points within government for matters relating to the implementation of the Convention, and shall give due consideration to the establishment or designation of a coordination mechanism within government to facilitate related action in different sectors

The European Union, as whole, became a party to the CRPD in 2010.<sup>29</sup> It places legal obligations on all EU actors, including judges and justice professionals in EU Member States, to interpret the EU legal framework in the light of the CRPD.

The Committee on the Rights of Persons with Disabilities, established by the Convention (article 34), monitors the implementation and compliance of the Convention by States Parties. The Committee issues reviews period reports, submitted by States on their implementation, and issues concluding observations.<sup>30</sup> The Committee has adopted a number of General Comments that, together with the commentary on State periodic reports and decisions on individual communications, serve as authoritative interpretations of the CRPD. In relation to access to justice in criminal proceedings, the most consequential General Comments are:

- General Comment No. 1 on article 12: Equal recognition before the law
- General Comment No. 2 on article 9: Accessibility
- General Comment No. 4 on article 24: Right to inclusive education
- General Comment No. 5 on article 19: Right to live independently and be included in the community
- General Comment No. 6 on article 5: Equality and non-discrimination

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and at different levels (para 1). There also has to be a national framework, including one or more independent mechanisms, to promote, protect and monitor implementation of the CRPD (Art 33.2). Civil society, in particular persons with disabilities and their representative organizations, shall be involved and participate fully in the monitoring process (article 33.3).

<sup>29</sup> Participant European States and year of ratification or accession: Albania (2013), Andorra (2014), Armenia (2010), Austria (2008), Azerbaijan (2009), Belarus (2016), Belgium (2009), Bosnia and Herzegovina (2010), Bulgaria (2012), Croatia (2007), Cyprus (2011), the Czech Republic (2009), Denmark (2009), Estonia (2012), Finland (2016), France (2010), Georgia (2014), Germany (2009), Greece (2012), Hungary (2007), Iceland (2016), Ireland (2018), Italy (2009), Latvia (2010), Lithuania (2010), Luxembourg (2011), Malta (2012), Monaco (2017), Montenegro (2009), Netherlands (2016), North Macedonia (2011), Norway (2013), Poland (2012), Portugal (2009), Republic of Moldova (2010), Romania (2011), Russian Federation (2012), San Marino (2008), Serbia (2009), Slovakia (2010), Slovenia (2008), Spain (2007), Sweden (2008), Switzerland (2014), Turkey (2009), Ukraine (2010), United Kingdom of Great Britain and Northern Ireland (2009). See: Status of the Convention on the Rights of Persons with Disabilities (2006), accessible [here](#).

<sup>30</sup> Concluding observations by the CRPD Committee can be found for each specific country here: [https://tbinternet.ohchr.org/\\_layouts/15/TreatyBodyExternal/TBSearch.aspx?Lang=en&TreatyID=4&DocTypeID=5](https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/TBSearch.aspx?Lang=en&TreatyID=4&DocTypeID=5).

The Optional Protocol to the CRPD<sup>31</sup> establishes a communications procedure, under which the CRPD Committee can receive individual complaints by individuals who claim that their CRPD rights have been violated.<sup>32</sup> The Committee adjudicates and rules on these complaints. The decisions should be respected by States, although strictly legally speaking, they do not by themselves create binding legal obligations.

The CRPD Committee also issued Guidelines on article 14<sup>33</sup> on the right to liberty and security of persons with disabilities in 2016. The Committee reaffirms that liberty and security of the person is a right to which everyone is entitled and it affirms the absolute ban on deprivation of liberty on the basis of actual or perceived impairment, which in practice often takes place as medical/forensic detention.<sup>34</sup>

In 2022, the CRPD issued Guidelines on deinstitutionalization, including in emergencies.<sup>35</sup> The Guidelines complement and should be read in conjunction with the Committee's General Comment No. 5 (2017) on living independently and being included in the community (article 19 of the Convention)<sup>36</sup> and the Committee's

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<sup>31</sup> Participant European States and year of ratification or accession: Andorra (2014), Austria (2008), Azerbaijan (2009), Belgium (2009), Bosnia and Herzegovina (2010), Croatia (2007), Cyprus (2011), the Czech Republic (2021), Denmark (2014 – not applicable to Greenland), Estonia (2012), Finland (2016), France (2010), Georgia (2021), Germany (2009), Greece (2012), Hungary (2007), Italy (2009), Latvia (2010), Lithuania (2010), Luxembourg (2011), Malta (2012), Monaco (2019), Montenegro (2009), North Macedonia (2011), Portugal (2009), San Marino (2008), Serbia (2009), Slovakia (2010), Slovenia (2008), Spain (2007), Sweden (2008), Turkey (2015), Ukraine (2010), UK (2009). European States that are signatories to the OP but have not yet ratified or acceded to it: Armenia (signed in 2007), Bulgaria (signed in 2008), Iceland (signed in 2007), Republic of Moldova (signed in 2018), Romania (signed in 2008). European States that are not signatories to the OP, but only to the CRPD: Albania, Belarus, Ireland, Netherlands, Norway, Poland, Russian Federation, Switzerland. The European Union is not a signatory to the Optional Protocol. Status of the Optional Protocol to the Convention on the Rights of Persons with Disabilities (2006), accessible here: <[https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-15-a&chapter=4&clang=en](https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-15-a&chapter=4&clang=en)>.

<sup>32</sup> So far, there have been already cases of the CRPD concluding observations on EU Member States that have led to legislative changes like Concluding observations on the initial report of Spain, CRPD/C/ESP/CO/1 (2011), or Concluding observations on the initial report of Hungary, CRPD/C/HUN/CO/1 (2012). There has also been a general impact of the CRPD at EU level as shown by this FRA Report: FRA, Implementing the United Nations Convention on the Rights of Persons with Disabilities (CRPD) - An overview of legal reforms in EU Member States, FRA Focus 05/2015 (2015), available at [Implementing the United Nations Convention on the Rights of Persons with Disabilities \(CRPD\) \(europa.eu\)](https://fra.europa.eu/en/implementation/crpd). In particular, there has been an impact on legal capacity (article 12 CRPD) – see pp. 9-11 of the FRA Report.

<sup>33</sup> The *Guidelines on the right to liberty and security of persons with disabilities* are contained in the Annex to A/72/55, the Committee's Bi-Annual Report 2016.

<sup>34</sup> *Ibid.* paras 3, 6, 8.

<sup>35</sup> UN CRPD Committee, Guidelines on deinstitutionalization, including in emergencies, UN Doc. CRPD/C/5 (2022).

<sup>36</sup> UN CRPD Committee, General comment No.5 on Article 19 - the right to live independently and be included in the community, UN Doc. CRPD/C/GC/5 (2017).

Guidelines on the right to liberty and security of persons with disabilities (article 14).<sup>37</sup> They address situations where persons with disabilities worldwide continue to be placed in institutions under life-threatening conditions, in contravention of legal obligations.<sup>38</sup>

Institutionalization is a discriminatory practice against persons with disabilities, contrary to article 5 of the Convention.<sup>39</sup> It involves *de facto* denial of the legal capacity of persons with disabilities, in breach of article 12. It constitutes detention and deprivation of liberty based on impairment, contrary to article 14. States parties should recognize institutionalization as a form of violence against persons with disabilities.<sup>40</sup> For the purpose of this Bench Book, a stark example of institutionalization is the abovementioned medical/forensic detention that is employed in criminal processes when the defendants are denied legal capacity and considered unaccountable for alleged criminal conduct.

*Leading provisions of the sources mentioned are detailed further in Chapters III. and IV. below.*

### **International Principles and Guidelines on Access to Justice for Persons with Disabilities**

In 2019, the UN Special Rapporteur on the Rights of Persons with Disabilities, an independent expert whose mandate is established by the UN Human Rights Council,<sup>41</sup> issued the International Principles and Guidelines on Access to Justice for Persons

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<sup>37</sup> UN CRPD Committee, Guidelines on the right to liberty and security of persons with disabilities, Annex to UN Doc. A/72/55 (2017).

<sup>38</sup> Ibid para. 4.

<sup>39</sup> Ibid para. 6.

<sup>40</sup> Ibid.39.

<sup>41</sup> The mandate of the Special Rapporteur on the Rights of Persons with Disabilities was established by the Resolution 26/20 (UN Human Rights Council, Resolution 26/20. Special Rapporteur on the rights of persons with disabilities, A/HRC/RES/26/20, 2023). The mandate was renewed in 2017 (UN Human Rights Council, Resolution 35/6. Special Rapporteur on the rights of persons with disabilities, A/HRC/RES/35/6, 2017), in 2020 (UN Human Rights Council, Resolution 44/10. Special Rapporteur on the rights of persons with disabilities, A/HRC/RES/44/10, 2020), and in 2023 (UN Human Rights Council, Resolution 53/14. Special Rapporteur on the rights of persons with disabilities, A/HRC/RES/53/14, 2023).

with Disabilities<sup>42</sup> (the International Principles). The International Principles constitute a practical tool to support States in adapting judicial systems so as to make them capable of providing for equal access to justice to persons with disabilities. The International Principles were endorsed by the International Commission of Jurists, the International Disability Alliance, and the UN Development Programme.

*The Principles provide crucial guidance for justice actors in criminal proceedings and are cited in Chapters III. and IV. in boxes for detailed reference.*

### **International Covenant on Civil and Political Rights (ICCPR), International Covenant on Economic, Social and Cultural Rights (ICESCR), UN Convention against Torture (CAT)**

It is important that international human rights law in general is implemented to, and equal and non-discriminatory manner, including on the basis of disability status, and therefore all provisions are potentially engaged when considering the rights of persons with disabilities. There are certain treaty provisions that warrant particular mention due to the frequency with which they are engaged in relation to access to justice.

Provisions of the International Covenant on Civil and Political Rights (ICCPR) that are of particular importance to justice actors in ensuring equal access to justice for persons with disabilities, including article 2 (non-discrimination and right to an effective remedy for ICCPR violations), article 7 (prohibition of torture and cruel, inhuman or degrading treatment or punishment), article 9 (right to liberty), article 14 (right to a fair trial) and article 26 (equality before the law).<sup>43</sup>

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<sup>42</sup> UN, Special Rapporteur on the Rights of Persons with Disability, International Principles and Guidelines on Access to Justice for Persons with Disabilities (2020).

<sup>43</sup> Article 2 and article 26 are important to guarantee the recognition of the legal capacity of all individuals including persons with disabilities. On the other hand, some common practices like institutionalization and substitute decision-making can amount to torture.

The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment<sup>44</sup> contains a number of provisions that may be engaged, including article 2 (prevention of torture), article 10 (training of officials), article 11 (review of the detention procedure), article 12 (prompt and impartial investigation), and article 13 (access to remedy) article 14(right to reparation)and article 16 (prevention of cruel, inhuman or degrading treatment or punishment).

In individual decisions, the United Nations Human Rights Committee has found violations of the rights of persons with disabilities, in a number of cases linked to the judicial process.<sup>45</sup> For instance, in the following case:

### **Lazarova v. Bulgaria<sup>46</sup>**

In its Views concerning Communication No. 3171/2018, the Human Rights Committee recognized a violation of articles 6, 7, and 10 (1) ICCPR. Ms. Lazarova was diagnosed with schizophrenia and an intellectual disability, and she died while being a resident of a social care structure. The Committee established that the State did not take appropriate measures to protect Ms. Lazarova's life during the period she was a resident in the social care structure. Moreover, it established that the victim was exposed to inhuman and degrading treatment and was deprived of her liberty in conditions that were not adequate for the respect for her human dignity. Therefore, the Committee required Bulgaria to make full reparations to the authors of the communication and to take the necessary steps to ensure that conditions in psychiatric care facilities are compatible with ICCPR.

The International Covenant on Economic, Social and Cultural Rights (ICESCR) engages a number of provisions, including article 2 (enjoying rights without

<sup>44</sup> UN General Assembly, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, UN Doc A/RES/39/46. Articles 2 and 11 CAT can be relevant in the case of practices like institutionalization or substitute decision-making. Articles 12 and 13 provide for important procedural safeguards that should be always guaranteed also when a defendant is a person with disabilities. Finally, article 10 requires the training of the justice official on the right of persons with disabilities. This specialized training is essential to guarantee the needs and rights of persons with disabilities.

<sup>45</sup> For more details, see for instance the HRC views in: *J.S.K.N. v Denmark*, Communication No. 2754/2016, 25 October 2022, CCPR/C/136/D/2754/201; *LMR v. Argentina*, Communication No. 1608/2007, 28 April 2011, CCPR/C/101/D/1608/2007; or *Lazarova v. Bulgaria*, Communication No. 3171/2018, 27 April 2023, CCPR/C/137/D/3171/2018.

<sup>46</sup> *Lazarova v. Bulgaria*, Communication No. 3171/2018, 27 April 2023, CCPR/C/137/D/3171/201.

discrimination), article 3 (equality of men and women), article 6 (right to work), article 7 (just and favourable conditions of work), article 11 (rights to food, clothing and housing), article 12 (right to health) and article 13 (right to education).

The Committee on Economic, Social and Cultural Rights, (CESCR), defines discrimination against persons with disabilities as “any distinction, exclusion, restriction or preference, or denial of reasonable accommodation, based on disability, which has the effect of nullifying or impairing the recognition, enjoyment or exercise of economic, social or cultural rights.”<sup>47</sup> States Parties should address discrimination and denial of reasonable accommodation, *inter alia*, in courts and through judicial interpretation.<sup>48</sup> The CESCR has previously addressed discrimination against persons with disabilities in the context of various specific rights.<sup>49</sup>

### **European Convention on Human Rights (ECHR)**

The rights of persons with disabilities are engaged under various provisions of the European Convention on Human Rights (ECHR).<sup>50</sup> For the procedural rights of defendants with disabilities, it is especially relevant to consider the jurisprudence on article 3 (Prohibition of torture and inhuman or degrading treatment or punishment),<sup>51</sup>

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<sup>47</sup> CESCR GC 5, para15, CESCR GC 20, para. 28.

<sup>48</sup> Ibid.47.

<sup>49</sup> UN Economic and Social Council, Committee on Economic, Social and Cultural Rights General comment No. 25 (2020) on science and economic, social and cultural rights (article 15 (1) (b), (2), (3) and (4) of the International Covenant on Economic, Social and Cultural Rights), UN Doc. E/C.12/GC/25 (2020); UN Economic and Social Council, Committee on Economic, Social and Cultural Rights General comment No. 24 (2017) on State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities, UN Doc. E/C.12/GC/24 (2017); UN Economic and Social Council, Committee on Economic, Social and Cultural Rights General comment No. 23 (2016) on the right to just and favourable conditions of work (article 7 of the International Covenant on Economic, Social and Cultural Rights), UN Doc. E/C.12/GC/23 (2016); UN Economic and Social Council, Committee on Economic, Social and Cultural Rights General comment No. 22 (2016) on the right to sexual and reproductive health (article 12 of the International Covenant on Economic, Social and Cultural Rights), UN Doc. E/C.12/GC/22 (2016).

<sup>50</sup> For further ECHR articles under which disability rights have been examined please see: [https://www.echr.coe.int/documents/fs\\_disabled\\_eng.pdf](https://www.echr.coe.int/documents/fs_disabled_eng.pdf).

<sup>51</sup> ECtHR, *Z.H. v. Hungary*, Application No. 28973/11, Judgment of 8 February 2013; ECtHR Grand Chamber, *Blockhin v. Russia*, Application No. 47152/06, Judgment of 23 March 2016.

article 5 (Right to liberty ),<sup>52</sup> article 6 (Right to a fair trial),<sup>53</sup> article 13 (Right to an effective remedy),<sup>54</sup> and article 14 (Prohibition of discrimination).<sup>55</sup>

The CRPD has been relied upon and referred to in the jurisprudence of the European Court of Human Rights on many occasions. For example, in its decision in *Glor v. Switzerland*<sup>56</sup> the ECtHR held that the CRPD provided evidence of “a European and worldwide consensus on the need to protect people with disabilities from discriminatory treatment.”<sup>57</sup> The Court then also found a violation of article 14 (Prohibition of discrimination) of the ECHR based on the applicant’s disability for the first time. The Court has also applied various articles of the CRPD in its jurisprudence.<sup>58</sup>

*Further case-law of the ECtHR is referred to in relevant sections III. and IV. below.*

Moreover, in relation to legal capacity, the Court has found a blanket denial of legal capacity to persons with disabilities as a violation of the right to a fair trial.<sup>59</sup>

*See further details in [section III.1 Legal capacity](#).*

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<sup>52</sup> ECtHR, *Shutkaturov v Russia*, Application No. [44009/05](#), Judgment of 27 March 2008; ECtHR, *H.L. v. the United Kingdom*, Application No. 45508/99, Judgment of 5 October 2004.

<sup>53</sup> ECtHR, *Stanev v. Bulgaria*, Application No. 36760/06, judgment 17 January 2012; ECtHR, *Shutkaturov v. Russia*, Application No. [44009/05](#), Judgment of 27 March 2008; ECtHR, *Nikolyan v. Armenia*, Application no. [74438/14](#), Judgment of 3 January 2020;

<sup>53</sup> ECtHR Grand Chamber, *Blockhin v. Russia*, Application No. 47152/06, Judgment of 23 March 2016.

<sup>54</sup> ECtHR, *Stanev v. Bulgaria*, Application No. 36760/06, Judgment 17 January 2012.

<sup>55</sup> ECtHR, *Glor v. Switzerland*, Application No. 13444/04, Judgment 30 April 2009.

<sup>56</sup> *Glor v. Switzerland* (Application No. 13444/04, judgment 30 April 2009).

<sup>57</sup> *Ibid.*, para. 53, also referring to Recommendation 1592 (2003) towards full social inclusion of people with disabilities, adopted by the Parliamentary Assembly of the Council of Europe on 29 January 2003, or the United Nations Convention on the Rights of Persons with Disabilities, which entered into force on 3 May 2008.

<sup>58</sup> See for instance: ECtHR, *Guberina v. Croatia*, Application No. [23682/13](#), Judgment of 22 March 2016; ECtHR, *Çam v. Turkey*, Application No. [51500/08](#), Judgment of 23 May 2016; ECtHR, *Enver Şahin v. Turkey*, Application No. [23065/12](#), Judgment of 30 January 2018.

<sup>59</sup> ECtHR, *Dragan Kovačević v. Croatia*, Application No. [49281/15](#), Judgment of 12 August 2022.

## European Committee on Social Rights

The European Social Charter protects the rights of persons with disabilities in its article 15 (“The right of persons with disabilities to independence, social integration and participation in the life of the community”).<sup>60</sup>

The European Committee on Social Rights can consider collective complaints against States Parties. For instance, in a recent groundbreaking decision in *European Disability Forum (EDF) and Inclusion Europe v. France*, Complaint No. 168/2018,<sup>61</sup> the Committee found a violation of several provisions of the European Social Charter (articles 11, 15 and 16), for the lack of accessibility for persons with disabilities to healthcare services, education, buildings and facilities, public transport, social support services, and financial support.<sup>62</sup> The decision also relates to the institutionalization of persons with disabilities.

*Please see further details in [section IV](#) below.*

The Committee of Ministers adopted the Council of Europe Action Plan 2006-2015 in April 2006.<sup>63</sup> Action 12 within this Plan urges Member States to take specific measures,

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<sup>60</sup> Council of Europe, European Social Charter (Revised) (1996) ETS No. 163, Part IV article D; Council of Europe, Additional Protocol to the European Social Charter Providing for a System of Collective Complaints (1995) ETS No. 158. article 15 reads in full:

“Article 15 –The right of persons with disabilities to independence, social integration and participation in the life of the community  
With a view to ensuring to persons with disabilities, irrespective of age and the nature and origin of their disabilities, the effective exercise of the right to independence, social integration and participation in the life of the community, the Parties undertake, in particular:

(1) to take the necessary measures to provide persons with disabilities with guidance, education and vocational training in the framework of general schemes wherever possible or, where this is not possible, through specialised bodies, public or private

(2) to promote their access to employment through all measures tending to encourage employers to hire and keep in employment persons with disabilities in the ordinary working environment and to adjust the working conditions to the needs of the disabled or, where this is not possible by reason of the disability, by arranging for or creating sheltered employment according to the level of disability. In certain cases, such measures may require recourse to specialised placement and support services;

(3) to promote their full social integration and participation in the life of the community in particular through measures, including technical aids, aiming to overcome barriers to communication and mobility and enabling access to transport, housing, cultural activities and leisure.”

<sup>61</sup> ECSR, *European Disability Forum (EDF) and Inclusion Europe v. France*, Complaint No. 168/2018.

<sup>62</sup> *Ibid.* para. 293 and 310.

<sup>63</sup> Council of Europe, Committee of the Ministers (2006), Recommendation Rec(2006)5 to member States on the Council of Europe Action Plan to promote the rights and the full participation of people with disabilities in society: improving the quality of life of people with disabilities in Europe 2006–2015, 5 April 2006.

including to ensure persons with disabilities have equal access to the judicial system by securing their right to information and communication that are accessible to them.

The Council of Europe has also developed a disability strategy for the period 2017-2023 to set out its priorities for the promotion, protection, and implementation of disability rights.<sup>64</sup> The document identifies equal recognition before the law as one of its priorities, and it focuses on the issues of legal capacity and access to justice for persons with disabilities.<sup>65</sup>

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<sup>64</sup> Council of Europe, Human rights: a reality for all. Council of Europe Disability Strategy 2017-2023 (2016).

<sup>65</sup> Ibid. para. 61-64.

## B. EU Law and Standards

The EU has acceded to the UN Convention on the Rights of Persons with Disabilities (CRPD). The EU as a whole, in addition to individual EU Member States must therefore comply with the CRPD obligations in all implementation of EU law. They are all also bound by the European Convention of Human Rights and most other provisions of UN human rights treaties.

Articles 47-50 of the EU Charter of Fundamental Rights of the European Union (the Charter)<sup>66</sup> enshrine fair trial rights, with article 48(2) of the Charter guaranteeing respect for the rights of the defence. Article 21 prohibits discrimination on the grounds of disability<sup>67</sup> and article 20 guarantees the right to equal access to justice.<sup>68</sup>

Under EU law, persons who are suspected or accused of an offence have rights according to EU legislation, that must be respected in all EU countries. These rights include right to information, the right to interpretation and translation, the right to have a lawyer, the right to be presumed innocent and to be represented at trial, and, the right to legal aid.

The EU acquis on procedural rights consists of the following instruments:

- Directive on the right to interpretation and translation in criminal proceedings (2010/64/EU)<sup>69</sup>
- Directive on the right to information in criminal proceedings (2012/13/EU)<sup>70</sup>

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<sup>66</sup> Article 47, Charter of Fundamental Rights: 'Right to an effective remedy and to a fair trial. Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article... Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice.' European Union: Charter of Fundamental Rights of the European Union (2007/C 303/01), 14 December 2007.

<sup>67</sup> EU Charter, article 21: 'Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited.'

<sup>68</sup> EU Charter, article 20: 'Everyone is equal before the law.'

<sup>69</sup> Directive 2010/64/EU of the European Parliament and of the Council – articles 1, 2, 4 and 5.

<sup>70</sup> Directive 2012/13/EU of the European Parliament and of the Council– On the right to information in criminal proceedings – articles 3, 4, 6 and 7.

- Directive on the right of access to a lawyer in criminal proceedings (2013/48/EU)<sup>71</sup>
- Directive on strengthening of certain aspects of the presumption of innocence and on the right to be present at the trial in criminal proceedings (2016/343/EU)<sup>72</sup>
- Directive on legal aid for suspects and accused persons in criminal proceedings (2016/1919/EU)<sup>73</sup>
- Directive on procedural safeguards for children suspected or accused in criminal proceedings (2016/800/EU)

The European Commission has also issued two particularly pertinent recommendations:

- Recommendation on procedural safeguards for vulnerable persons suspected or accused in criminal proceedings (2013)<sup>74</sup>
- Recommendation on procedural rights of suspects and accused persons subject to pre-trial detention and on material detention conditions (2022)<sup>75</sup>

The EU Directives and Recommendations must be read in line with EU Charter articles 6, articles 47- 48 and articles 6 and 13 of the ECHR, and articles 5, 9, 14 and 2(3) of

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<sup>71</sup> Directive 2013/48/EU of the European Parliament and of the Council – On right to access to a lawyer in criminal proceedings, including EAW and on the right to have a third party informed about deprivation of liberty and communicate with third persons – articles 3, 4, 11 and 13.

<sup>72</sup> Directive (EU) 2016/343 of the European Parliament and of the Council of 9 March 2016 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings – article 6 – 8 and Recital 42.

<sup>73</sup> Directive (EU) 2016/1919 of the European Parliament and of the Council of 26 October 2016 on legal aid for suspects and accused persons in criminal proceedings and for requested persons in European arrest warrant proceedings – articles 4 and 9.

<sup>74</sup> Commission Recommendation of 27 November 2013 on procedural safeguards for vulnerable persons suspected or accused in criminal proceedings – sections 2 and 3.

<sup>75</sup> The Recommendation prohibits discrimination, including on the basis of disability (article 13), provides minimum standards for material detention conditions for detainees (access to appropriate care, nutritious diet or visits from families or legal representatives). It also stresses that Member States should “take special care to meet the needs of and ensure accessibility for detainees with disabilities or serious medical conditions with regards to material detention conditions and detention regimes” (article 76). According to article 75 of the Recommendation: “[P]ersons with disabilities or other persons with serious medical conditions (should) receive appropriate care comparable to that provided by the national public health system which meets their specific needs. In particular, Member States should ensure that persons who are diagnosed with mental health related medical conditions receive specialised professional care, where needed in specialised institutions or dedicated sections of the detention facility under medical supervision, and that continuity of healthcare is provided for detainees in preparation of release, where necessary.” Brussels, 8.12.2022 C(2022) 8987 final.

the ICCPR, which provide the right to a fair trial, including pre-trial rights, and access to an effective remedy. Importantly, they must, as a matter of EU law and IHRL more generally, also be read consistently with the CRPD. The implementation of the Directives and Recommendations, through their incorporation within national legislation and policy must similarly comply with this binding international legal framework.

While there is no specific EU instrument specifically addressed to the rights of defendants with disabilities, there is the EU strategy on victims rights,<sup>76</sup> which provides a number of important safeguards also for persons with disabilities in criminal proceedings, which is generally overlapping with those for defendants with disabilities.

The set of procedural EU Directives includes broadly worded provisions that in practice can, and should be, interpreted by justice actors to provide appropriate rights protections to defendants with disabilities, consistent with their human rights. Nevertheless, the procedural directives fail to include disability specifically within their scope.<sup>77</sup> The Directives should, by now, have been converted into national legislation of EU Member States. However, they have not yet been fully implemented in law, and in some cases, even if legislation has been put in place, practice and policy still tends to lag behind laws.<sup>78</sup>

None of the Directives are appropriately tailored to State obligations to ensure access to justice for persons with disabilities on an equal basis, nor do they provide sufficient guidance and direction to justice actors in attempting to do so. Justice actors must therefore read the EU law instruments in light of State obligations in terms of the CRPD

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<sup>76</sup> EU strategy on victims rights <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52020DC0258>.

<sup>77</sup> KERA Foundation, [Briefing paper on barriers faced by defendants with intellectual and/or psychosocial disabilities in the Criminal Justice System in Bulgaria](#), Veliko Tarnovo, ENABLE Project, 2023, p. 20.

<sup>78</sup> For instance, “the Court of Justice of the European Union (CJEU), in its judgment of 01.08.2022 in case C-242/22 PPU, has ruled on the (non)conformity of Portuguese national law regarding the assistance by an interpreter in criminal proceedings and the translation of certain procedural documents with the provisions. Fair Trials (2022). Available at <https://www.fairtrials.org/articles/legal-analysis/cjeu-judgment-rights-of-suspected-and-accused-people-in-portugal-case-no-c-242-22-ppu/>.

and other applicable IHRL and standards to ensure that their application does not result in discrimination against persons with disabilities.<sup>79</sup> In its recent report, titled “Towards Equal Rights for Persons with Disabilities”, the European Parliament (EP), takes as its starting point the binding legal obligations of Member States, in terms of the CRPD and the “authoritative guidance on its implementation”, provided by the CRPD Committee in its jurisprudence, including General Comments, Concluding Observations and decisions on individual communications.<sup>80</sup>

The interpretation of EU law, in light of the CRPD, is also reflected in the Recommendation on procedural rights of suspects and accused persons subject to pre-trial detention and on material detention conditions.<sup>81</sup> There is an important reference in the Preamble of this Recommendation linking it directly to the CRPD and specifically referring to State obligations in relation to reasonable accommodation and accessibility. It reads as follows:

“References in this Recommendation to appropriate measures to ensure effective access to justice for persons with disabilities should be understood in light of the rights and obligations under the United Nations Convention on the Rights of Persons with Disabilities to which the European Union and all its Member States are parties. In addition, it should be ensured that if persons with disabilities are deprived of their liberty in criminal proceedings, they are, on an equal basis with others, entitled to guarantees in accordance with international human rights law and shall be treated in compliance with the objectives and principles of the United Nations Convention on the Rights of Persons with Disabilities, including by

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<sup>79</sup> Article 216 TFEU establishes that “1. The Union may conclude an agreement with one or more third countries or international organisations where the Treaties so provide or where the conclusion of an agreement is necessary in order to achieve, within the framework of the Union’s policies, one of the objectives referred to in the Treaties, or is provided for in a legally binding Union act or is likely to affect common rules or alter their scope. 2. Agreements concluded by the Union are binding upon the institutions of the Union and on its Member States; the EU accessed to the CRPD through the Council Decision 2010/48/EC of 26 November 2009 concerning the conclusion, by the European Community, of the UN CRPD. (2010) OJ L 23.

<sup>79</sup>European Parliament, REPORT Towards equal rights for persons with disabilities, 30.11.2022 - (2022/2026(INI)) [https://www.europarl.europa.eu/doceo/document/A-9-2022-0284\\_EN.html](https://www.europarl.europa.eu/doceo/document/A-9-2022-0284_EN.html),

<sup>81</sup> Brussels, 8.12.2022 C(2022) 8987 final.

providing reasonable accommodation for special needs and by ensuring accessibility.”<sup>82</sup>

According to the Recommendation,

“Guidance should be provided on safeguarding the rights of persons for whom deprivation of liberty constitutes a situation of particular vulnerability, such as women, children, persons with disabilities or serious health conditions, LGBTIQ and foreign nationals, as well as the prevention of radicalisation in prisons.”<sup>83</sup>

In addition,

“Member States should take into account the special needs of particular groups of detainees, including women, children, elderly persons, persons with disabilities or serious health conditions, LGBTIQ, persons with a minority racial or ethnic background and foreign nationals, in all decisions relating to their detention.”<sup>84</sup>

The aim of the Recommendation on procedural safeguards for vulnerable persons suspected or accused in criminal proceedings<sup>85</sup> is to protect people in criminal proceedings who are particularly “vulnerable.”<sup>86</sup> The Recommendation calls upon Member States to strengthen certain procedural rights of “vulnerable” suspects or accused persons in criminal proceedings. It stresses the right to information, the right to access to a lawyer, and safeguards related to deprivation of liberty. In particular, there are some recommendations that can apply to defendants with disabilities. For example, the Recommendation prescribes that Member States should guarantee

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<sup>82</sup> Ibid. Recital 34.

<sup>83</sup> Ibid. Preamble, Recital 22.

<sup>84</sup> Ibid. Recital 29.

<sup>85</sup> Commission Recommendation of 27 November 2013 on procedural safeguards for vulnerable persons suspected or accused in criminal proceedings – sections 2 and 3. see here: [https://commission.europa.eu/strategy-and-policy/policies/justice-and-fundamental-rights/criminal-justice/rights-suspects-and-accused\\_en#designingcriminallaw](https://commission.europa.eu/strategy-and-policy/policies/justice-and-fundamental-rights/criminal-justice/rights-suspects-and-accused_en#designingcriminallaw)

<sup>86</sup> Ibid.85.

access to reasonable accommodations for vulnerable persons deprived of their liberty.<sup>87</sup> It also refers to the accessibility of important information on procedural rights.<sup>88</sup>

At the same time, the Recommendation contains a number of critical elements in regard to the identification of the barriers and special needs that vulnerable persons might need during judicial proceedings. It recognizes the need to promptly identify the vulnerabilities and needs of the defendants.<sup>89</sup> It also mentions important concepts that are, to an extent, in line with the CRPD and its principles. For instance, it recommends training justice professionals and law enforcement authorities, as well as the accessibility of information in different formats.<sup>90</sup>

The framing of the Recommendation is not wholly in line with States obligations under the CRPD. The definition of “vulnerable” persons provided in the Recommendation includes persons who “are not able to understand and to effectively participate in criminal proceedings due to age, their mental or physical condition or disabilities.”<sup>91</sup> Whereas this framing emphasizes vulnerability and directs itself towards a medicalized understanding of disability, the CRPD requires support to ensure the full participation of all persons with disabilities in criminal proceedings and adopts a social approach to disability. In addition, the standard of “reasonable accommodation” is lower than the CRPD standard of “procedural accommodation”, which is not subject to a test of proportionality. *Please find further details on these instruments throughout [Chapters III and IV](#) below.*

The European Commission developed an EU disability strategy for the period 2021-2030.<sup>92</sup> The EU Strategy for the Rights of Persons with Disabilities also considers equal access to justice and non-discrimination as EU priorities.<sup>93</sup> Some EU Directives

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<sup>87</sup> Ibid. Recommendation No. 14.

<sup>88</sup> Ibid. Recommendation No. 8.

<sup>89</sup> Ibid. para. 2-4.

<sup>90</sup> Ibid. para. 5-17.

<sup>91</sup> Ibid. Recital 1.

<sup>92</sup> EU Commission, Union of Equality Strategy for the Rights of Persons with Disabilities 2021-2030, COM(2021) 101 final (2021).

<sup>93</sup> Ibid. section 5.2.

explicitly mention disability, but only in the context of broader prescriptions concerning the integration of persons with disabilities and the fair administration of the justice system.<sup>94</sup>

The European Parliament, in a Committee report on equal rights for persons with disabilities, has asserted that the lack of a common EU definition of disability constitutes a major obstacle to the codification of disability assessment and the mutual recognition of national decisions on disability issues, particularly in the context of eligibility for access to specific facilities and services in the field of social security.<sup>95</sup> The EP Committee on Civil Liberties, Justice and Home Affairs therefore called on the Commission and the Member States to work towards developing mutual definitions of key terms related to the implementation of the CRPD, such as “accessibility”, “participation” and “community-based living”<sup>96</sup> and urged the Commission to put forward a proposal for a harmonized definition of disability at the EU level.<sup>97</sup> It also highlighted the importance of a holistic definition and application of accessibility and its value as an indispensable basis for persons with disabilities to have equal opportunities, as recognized in the CRPD and in line with CRPD General Comment No. 2, taking into account the diversity of the needs of persons with disabilities, and promoting universal design as a principle of the EU.<sup>98</sup>

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<sup>94</sup> EU Parliament, Towards equal rights for persons with disabilities, 13 December 2022, [A9-0284/2022](#).

<sup>95</sup> Ibid<sup>94</sup> para H.

<sup>96</sup> Ibid, para. 4.

<sup>97</sup> Ibid para. 7.

<sup>98</sup> Ibid. para. 6.

# 03

ACCESS TO JUSTICE FOR  
PERSONS WITH  
DISABILITIES

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Chapter III addresses the barriers that persons with disabilities face during the justice process, with a particular focus on defendants with disabilities. This chapter gives an overview of the main challenges in guaranteeing the rights of persons with disabilities and also presents promising practices and recommendations on how to overcome these barriers.

The Chapter covers the challenges in guaranteeing equal treatment before the law, the right to legal capacity, and the right to participation of persons with disabilities; the opportunities offered by restorative justice in this context; and the possible ways to improve the training of justice professionals on the rights of persons with disabilities; and the right to a fair trial and an effective remedy.

At the end of each section, there are practical and systemic recommendations. The practical guidance and recommendations are directed at justice actors working with defendants with disabilities, in order to provide guidance and promising practice examples on how to integrate the relevant standards into practice. The systemic recommendations also target policymakers and legislators, providing suggestions of legislative changes or modifications to the functioning of the court system, in order to ensure effective access to justice for persons with disabilities.

The recommendations in Chapter III are built upon in Chapter IV, which describes procedural rights of defendants with disabilities.

Articles 12 and 13 of the CRPD, at the time of treaty's adoption, constituted a paradigm shift in the legal recognition of the autonomy of persons with disabilities. The Convention rejects certain historically entrenched understandings of disability, by which persons with disabilities have been deprived of any means to exercise their will and preferences and in many countries have effectively resulted in their being denied access to justice and procedural safeguards on an equal basis with others.<sup>99</sup>

This paradigm shift, which has been adopted by the ECHR,<sup>100</sup> the European Parliament,<sup>101</sup> and various other entities,<sup>102</sup> necessitates a review and revision of all existing laws, policies and procedures by each and every State. Few States have

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<sup>99</sup> UN, Special Rapporteur on the Rights of Persons with Disability, International Principles and Guidelines on Access to Justice for Persons with Disabilities (2020), p.6.

<sup>100</sup> Council of Europe, Disability Strategy 2017-2023. Human Rights a Reality for All., 2017, paras 61-64.

<sup>101</sup> European Parliament, REPORT Towards equal rights for persons with disabilities, 30.11.2022 - (2022/2026(INI)) [https://www.europarl.europa.eu/doceo/document/A-9-2022-0284\\_EN.html](https://www.europarl.europa.eu/doceo/document/A-9-2022-0284_EN.html), para. O.

<sup>102</sup> European Commission, Union of Equality Strategy for the Rights of Persons with Disabilities 2021-2030, 2021, [KE0221257ENN\\_002\\_proof 2 \(1\).pdf](https://ec.europa.eu/equality-union/ke0221257enn_002_proof_2_1.pdf).

undertaken this task comprehensively, although there has been some gradual progress in some.

National justice actors, including judges, have obligations under the CRPD to review and revise processes and procedures to ensure compliance with their obligations under the CRPD.

### **Article 12 CRPD – Equal Recognition before the law**

1. States Parties reaffirm that persons with disabilities have the right to recognition everywhere as persons before the law.
2. States Parties shall recognize that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life.
3. States Parties shall take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity.
4. States Parties shall ensure that all measures that relate to the exercise of legal capacity provide for appropriate and effective safeguards to prevent abuse in accordance with international human rights law. Such safeguards shall ensure that measures relating to the exercise of legal capacity respect the rights, will and preferences of the person, are free of conflict of interest and undue influence, are proportional and tailored to the person's circumstances, apply for the shortest time possible and are subject to regular review by a competent, independent and impartial authority or judicial body. The safeguards shall be proportional to the degree to which such measures affect the person's rights and interests.
5. Subject to the provisions of this article, States Parties shall take all appropriate and effective measures to ensure the equal right of persons with disabilities to own or inherit property, to control their own financial affairs and to have equal access to bank loans, mortgages and other forms of financial credit, and shall ensure that persons with disabilities are not arbitrarily deprived of their property.

### **Article 13 CRPD – Access to Justice**

1. States Parties shall ensure effective access to justice for persons with disabilities on an equal basis with others, including through the provision of procedural and age-appropriate accommodations, in order to facilitate their effective role as direct and indirect participants, including as witnesses, in all legal proceedings, including at investigative and other preliminary stages.
2. In order to help to ensure effective access to justice for persons with disabilities, States Parties shall promote appropriate training for those working in the field of administration of justice, including police and prison staff.

Justice actors must comply with the CRPD and should implement the International Principles to ensure fair and effective justice systems.

## **A. Equal treatment before the law, legal capacity and equal participation**

### **Equal treatment before the law**

As recognized by the CRPD Committee in its General Comment No.6, persons with disabilities typically do not enjoy their rights on an equal basis with others because of, among other factors, “deprivation of legal capacity, forced institutionalization, exclusion from general education, pervasive negative stereotypes, prejudices, and lack of access to employment.”<sup>103</sup>

Reasonable accommodations are essential safeguards to overcome these barriers. Article 5 of the CRPD requires that States “take all appropriate steps to ensure that reasonable accommodation is provided” (article 5(3)) and provides that “specific measures which are necessary to accelerate or achieve *de facto* equality of persons with disabilities shall not be considered discrimination under the terms of the present Convention” (article 5(4)).<sup>104</sup>

Other international human rights treaties provide for the obligations to ensure that people are “equal before the law”, which describes the entitlement of persons to equal treatment by and in the application of the law. “In order that this right may be fully realized, the judiciary and law enforcement officers must not, in the administration of justice, discriminate against persons with disabilities.”<sup>105</sup>

The CRPD provides for some important steps to guarantee equality and avoid discrimination. According to article 5, States “shall take all appropriate steps to ensure that reasonable accommodation is provided.”<sup>106</sup> The CRPD Committee provides examples of such reasonable accommodations, including: “making existing facilities

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<sup>103</sup> CRPD Committee, General Comment No. 6, para. 8.

<sup>104</sup> Validity Foundation, [Humanising Justice: International report from Voices for Justice: Communicating with Victims of Crime with Disability](#), 2022, p. 20.

<sup>105</sup> CRPD Committee, General Comment No. 6, para. 14.

<sup>106</sup> CRPD, article 5.3.

and information accessible to the individual with a disability; modifying equipment; reorganizing activities; rescheduling work; adjusting curricula learning materials and teaching strategies; adjusting medical procedures; or enabling access to support personnel without disproportionate or undue burden.”<sup>107</sup>

The Committee also explains that “reasonable accommodation” should not be confused with “specific measures,” sometimes also called “special measures” or “temporary special measures” in IHRL, and including what are often described as “affirmative action measures” in some domestic jurisdictions. According to the Committee:

“While both concepts aim at achieving de facto equality, reasonable accommodation is a non-discrimination duty, whereas specific measures imply a preferential treatment of persons with disabilities over others to address historic and/or systematic/systemic exclusion from the benefits of exercising rights. Examples of specific measures include temporary measures for countering the low numbers of women with disabilities employed in the private sector and support programmes to increase the number of students with disabilities in tertiary education.”<sup>108</sup>

For instance, in its views in the Communication *Medina Vela v. Mexico* No. 32/2015,<sup>109</sup> the CRPD Committee found a violation of article 5 in conjunction with article 4 for discriminatory treatment. In this matter, the applicant (a person with an intellectual disability) had not been given the opportunity to: testify in a case against them; designate their own defence lawyer; or receive support and reasonable or procedural accommodations. Consequently, the CRPD Committee considered that the application

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<sup>107</sup> CRPD Committee, General Comment No. 6, para. 23.

<sup>108</sup> CRPD Committee, General Comment No. 6, para. 25c.

<sup>109</sup> Views adopted by the Committee under article 5 of the Optional Protocol concerning communication *Medina Vela v. Mexico*, No. 32/2015, 15 October 2019, para. 10.4.

of the special procedure for persons with disabilities exempting them from criminal liability, as provided for in national law in Mexico, led to discriminatory treatment of the applicant, in violation of article 5, read in conjunction with article 4, of the Convention.<sup>110</sup>

Article 20 of the EU Charter of Fundamental Rights recognizes that “everyone is equal before the law”, while article 21 prohibits discrimination based on a range of grounds, including disability. The CRPD definition of discrimination has been directly adopted and incorporated into EU law.<sup>111</sup>

Article 26 of the ICCPR provides

“All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”

While disability is not expressly enumerated, it is covered under “other status.”

### *Intersectional discrimination*

Persons with disabilities sometimes also face other forms of discrimination and exclusion, which can impede their access to justice. Discrimination on the basis of disability may be compounded by simultaneous discrimination on the basis of other identities or bases, such as gender, ethnicity, religion, poverty, sexual orientation, gender identity or citizenship status.<sup>112</sup> For instance, women with disabilities tend to

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<sup>110</sup> Ibid. para. 11.

<sup>111</sup> European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee, and the Committee of the Regions, European Disability Strategy 2010-2020: A Renewed Commitment to a Barrier-Free Europe, COM(2010) 636 final (2010).

<sup>112</sup> UN OHCHR, ‘Report - Right to access to justice under article 13 of the Convention on the Rights of Persons with Disabilities’ (December 2017), A/HRC/37/25, para 16. As clarified by the CRPD in its General Comment No 6: “[d]iscrimination can be based

face more difficulties in accessing justice, compared to men with disabilities and women without disabilities.<sup>113</sup> The Committee on the Rights of People with Disabilities highlights that women with disabilities are more likely to have their credibility questioned and their accusations dismissed because of gender and disability stereotypes. They are also more likely to experience fear and be discouraged from seeking legal remedies because of the dismissive attitude of law enforcement authorities.<sup>114</sup>

Intersecting forms of discrimination should be understood and considered by all justice actors. Mandatory training programmes for those working in the justice system must address these intersecting forms of discrimination.<sup>115</sup>

The UN Intersectionality Resource Guide and Toolkit<sup>116</sup> presents a framework for action in the context of intersectional discrimination. The Guide shows how discrimination can happen both at individual and collective/systemic levels and it can affect both tangible and intangible elements. It highlights that many elements should be taken into account to understand intersectional discrimination. Elements such as agency, commitment, knowledge, and skills needed for equality should be taken into consideration, as well as access to and control over resources and opportunities. Equally, laws, policies, programmes, resource allocation, and accountability mechanisms are also essential aspects to be considered. Finally, social norms,

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on a single characteristic, such as disability or gender, or on multiple and/or intersecting characteristics. 'Intersectional discrimination' occurs when a person with a disability or associated to disability suffers discrimination of any form on the basis of disability, combined with, colour, sex, language, religion, ethnic, gender or other status. Intersectional discrimination can appear as direct or indirect discrimination, denial of reasonable accommodation or harassment." CRPD GC No 6, para. 19.

<sup>113</sup> UN Committee on the Rights of People with Disabilities, General Comment No. 3: Article 6. Women and Girls with Disabilities (2016) CRPD/C/GC/3.

<sup>114</sup> Ibid. para. 52.

<sup>115</sup> UN, Special Rapporteur on the Rights of Persons with Disability, International Principles and Guidelines on Access to Justice for Persons with Disabilities (2020), p. 26.

<sup>116</sup> UN WOMEN, Intersectionality Resource Guide and Toolkit. An Intersectional Approach to Leave No One Behind (2022), available at [INTERSECTIONALITY RESOURCE GUIDE AND TOOLKIT \(unwomen.org\)](https://www.unwomen.org/en/what-we-do/areas-of-focus/intersectionality-resource-guide-and-toolkit).

attitudes, and exclusionary practices can also have an impact on producing or compounding intersectional discrimination.<sup>117</sup>

### *Identification of defendants with disabilities*

Identification of detainees and defendants with disabilities is crucial to enhance access to all necessary support and accommodations.

The EU Recommendations state that:

“[i]t is essential that the vulnerability of a person suspected or accused in criminal proceedings is promptly identified and recognised. For that purpose, an initial assessment should be carried out by police officers, law enforcement or judicial authorities. The competent authorities should also be able to ask an independent expert to examine the degree of vulnerability, the needs of the vulnerable person and the appropriateness of any measures taken or envisaged against the vulnerable person.”<sup>118</sup>

This Recommendation addresses shortcomings in EU Member States. For instance, in reference to practices in Spain in 2020, the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment expressed concern about the lack of disability detection during admission to prison and during judicial proceedings, which resulted in persons with disabilities being exposed to justice processes and procedures which were inaccessible.<sup>119</sup>

Conducting an individual assessment is an important way to identify in a timely manner the rights and needs for support and accommodations of an individual with a disability. Such needs may change throughout the process or from time to time. Disability may

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<sup>117</sup> Ibid. p. 15.

<sup>118</sup> Commission Recommendation of 27 November 2013 on procedural safeguards for vulnerable persons suspected or accused in criminal proceedings, Recital 6.

<sup>119</sup> *Report to the Spanish government on the visit to Spain by the European Committee for the prevention of torture and inhuman or degrading treatment or punishment (CPT) from 14 to 28 September 2020.* <https://rm.coe.int/1680a47a78>, In Plena Inclusión, p. 8.

be evolving and dynamic and an initial assessment and identification should be supplemented by consistent monitoring and adapted taking into account an individuals' changing needs.

*See more below in [section IV.1.2 Individual assessment](#).*

### **Insanity defence**

All persons with disabilities have a right to (presumptive) legal capacity, i.e., to make legally effective decisions. They should not be denied access to justice or participation in any justice processes and procedures on the basis of disability.<sup>120</sup> The general assumption must be, in each and every case, that all people are capable of making, and thus being responsible for, their own decisions and actions.<sup>121</sup>

States must ensure that the legal capacity of persons with disabilities is recognized at all levels of the criminal justice system, without discrimination. States are required by the CRPD to “[e]nsure that constructs such as “cognitive incapacity” and “mental incapacity”, as determined, for instance, by functional or mental status assessments that are common in most legal systems, are not used to restrict the right to legal capacity.”<sup>122</sup>

Indeed, deprivation of legal capacity, whether formally mandated or as a result of informal or common and longstanding legal practices, processes and procedures, leads to exclusion from judicial and other legal processes. It has pervasive effects on the right of persons with disabilities to a fair trial under due process of law.<sup>123</sup> The CRPD Committee has condemned limitations that are often imposed on the rights of

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<sup>120</sup> UN, Special Rapporteur on the Rights of Persons with Disability, International Principles and Guidelines on Access to Justice for Persons with Disabilities, Principle 1.

<sup>121</sup> CRPD Committee, General Comment No. 1. Article 12: Equal recognition before the law, CRPD/C/GC/1 (2014), para. 15.

<sup>122</sup> Ibid. UN, Special Rapporteur on the Rights of Persons with Disability, International Principles and Guidelines on Access to Justice for Persons with Disabilities (2020), para. 1.2.c.

<sup>123</sup> UN OHCHR, 'Report - Right to access to justice under article 13 of the Convention on the Rights of Persons with Disabilities' (December 2017), A/HRC/37/25, para. 34.

persons with disabilities, such as deprivation of the right to be heard in person, pursue adversarial proceedings, give evidence or contest witnesses.<sup>124</sup> Where “instruments for protection” are availability concerning the rights of persons with disabilities they must not be “based on removing legal capacity or otherwise hindering the access of persons with disabilities to justice.”<sup>125</sup>

Consistent with obligations under the CRPD, the existence of a disability, based on a physical, mental, sensory or psychosocial impairment, must not “[...] be grounds for denying legal capacity and the imposition of ‘substitute decision-making’ – that is, a decision made by another person in the place of the person with a disability (not appointed by the person, done against his or her will, and not based on his or her own ‘will and preferences’).”<sup>126</sup>

States are required by the CRPD to provide the support necessary to enable persons with disabilities to make decisions that have legal effect.<sup>127</sup> Such support measures “must respect the rights, will and preferences of persons with disabilities and should never amount to substitute decision-making.”<sup>128</sup>

While this general principle seems clear enough, the CRPD Committee has pointed that State practice has been lagging behind. In most States, “where a person is considered to have impaired decision-making skills, often because of a cognitive or psychosocial disability, his or her legal capacity to make a particular decision is consequently removed.”<sup>129</sup>

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<sup>124</sup> Ibid.123.

<sup>125</sup> CRPD Committee, General Comment No. 6, para. 49 (c).

<sup>126</sup> CRPD Committee, General Comment No. 1. Article 12 : Equal recognition before the law, CRPD/C/GC/1(2014).

<sup>127</sup> Ibid, para. 16.

<sup>128</sup> CRPD Committee, General Comment No. 1, para. 17.

<sup>129</sup> CRPD Committee, General Comment No. 1, 11 April 2014, available at [General Comment No. 1 - Article 12: Equal recognition before the law \(Adopted 11 April 2014\) - Plain English version | OHCHR](#), para. 15.

This State practice constitutes a “functional approach” which “attempts to assess mental capacity and deny legal capacity accordingly.” In such an approach, determinations are typically “based on whether a person can understand the nature and consequences of a decision and/or whether he or she can use or weigh the relevant information.” The Committee concludes that this is a “flawed” approach inconsistent with the CRPD because:

“(a) it is discriminatorily applied to people with disabilities; and

(b) it presumes to be able to accurately assess the inner-workings of the human mind and, when the person does not pass the assessment, it then denies him or her a core human right.”<sup>130</sup>

The CRPD Committee has underlined that denial of legal capacity on the basis of a functional approach is discriminatory. Indeed, this approach presumes that the decision-making skills of a person with a disability are deficient in a way that applies solely to persons with disabilities and “presumes to be able to accurately assess the inner-workings of the human mind”, leading to the denial of rights.<sup>131</sup>

The CRPD Committee affirms, in relation to the right to health, that “[i]n conjunction with the right to legal capacity on an equal basis with others, States parties have an obligation not to permit substitute decision-makers to provide consent on behalf of persons with disabilities.”<sup>132</sup> In its Guidelines on article 14 (right to liberty), the CRPD Committee affirms that this obligation extends to emergency and crisis situations in the context of deprivation of liberty.<sup>133</sup>

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<sup>130</sup> Ibid.129.

<sup>131</sup> CRPD Committee, General Comment No. 1 (2014). Article 12: Equal recognition before the law, CRPD/C/GC/1 (2014), para 15.

<sup>132</sup>CRPD Committee, General Comment No. 1 (2014). Article 12: Equal recognition before the law, CRPD/C/GC/1 (2014), para. 41.

<sup>133</sup>CRPD Committee, Guidelines on article 14 of the Convention on the Rights of Persons with Disabilities – The right to liberty and security of persons with disabilities (2015), para. 22.

Under the CRPD, States must also make sure all health staff are aware of the right to free and informed consent of persons with disabilities for their treatment and acquire it prior to undertaking any treatment.<sup>134</sup> Health staff must provide all necessary information in a way that an individual with a disability can fully understand.<sup>135</sup>

Supported decision-making,<sup>136</sup> as opposed to substitute decisions making, is a model which requires that persons with disabilities are provided with a range of support options, including the support of people they may trust - for example, family, friends, peers, advocates, or lawyers - in order to support and enhance their ability to make decisions for themselves.<sup>137</sup> Under article 12 of the CRPD, States are required to take appropriate measures to provide access by persons with disabilities to the support when they may require in exercising their legal capacity.<sup>138</sup>

That support may be reinforced by intermediaries, who attempt to enhance communication with the person with a disability throughout the proceedings. (*Please see details below in [section IV.1 on Procedural accommodations](#)*).

For instance, in its views in the Communication *Medina Vela v. Mexico* (No. 32/2015),<sup>139</sup> the CRPD Committee found a violation of article 12 of the CRPD where the State denied the person with a disability the possibility to exercise their legal capacity to plead not guilty, challenge the evidence against them, designate a defence lawyer and challenge any decisions.<sup>140</sup> The State decided to apply a special procedure for persons exempt from criminal liability, and declared the applicant “unfit to testify”.<sup>141</sup>

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<sup>134</sup>CRPD Committee, “Guidelines on the right to liberty and security of persons with disabilities, Article 14: Liberty and security of person”, CRPD/PE/A/72/55 (September 2015), accessible [here](#).

<sup>135</sup> Ibid.134.

<sup>136</sup> See also the glossary above for substituted decision-making and supported decision-making.

<sup>137</sup> World Health Organization, “Supported decision-making and advance planning: WHO Quality Rights Specialized training,” 1 January 2019, accessible [here](#).

<sup>138</sup> Status of the Convention on the Rights of Persons with Disabilities (2006), accessible [here](#).

<sup>139</sup> Views adopted by the Committee under article 5 of the Optional Protocol concerning communication in *Medina Vela v. Mexico*, no 32/2015, 15 October 2019.

<sup>140</sup> Ibid. para. 10.6.

<sup>141</sup> Ibid. para. 10.4.

The CRPD Committee recalled in this case that States are obliged to recognize that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life, and to provide access by persons with disabilities to the support they may require in exercising their legal capacity.<sup>142</sup>

The CRPD Committee has stressed that “persons with cognitive or psychosocial disabilities have been, and still are, disproportionately affected by substitute decision-making regimes and denial of legal capacity”, preventing treatment on an equal basis with others.<sup>143</sup> Such regimes include, for instance, guardianship or curatorships over the person with a disability, that are currently used in a number of EU Member States.<sup>144</sup>

The case of *Marlon James Noble v. Australia* (No. 7/2012) concerned the the denial of legal capacity of persons with intellectual disabilities. The applicant was an individual with an intellectual disability who was charged with two criminal offences, but was declared unfit to stand trial and put into custody. The applicant complained of a violation of various rights, including his right to liberty and the right to access justice. The CRPD Committee, in finding a violation of these rights, stressed that States must “(e)nsure that adequate support and accommodation measures are provided to persons with mental and intellectual disabilities to enable them to exercise their legal capacity before the courts whenever necessary(...)”<sup>145</sup>

The CRPD Committee adopted a similar holding in *Doolan v. Australia* (No. 18/2013).<sup>146</sup> The communicant there was a person with psychosocial disability who had

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<sup>142</sup> Ibid. para. 10.6.

<sup>143</sup> CRPD Committee, General Comment No. 1. Article 12: Equal recognition before the law, CRPD/C/GC/1 (2014), para. 9.

<sup>144</sup> PiC, [Briefing paper on barriers faced by defendants with intellectual and/or psychosocial disabilities in the Criminal Justice System in Slovenia](#), Ljubljana, ENABLE project, 2023, p. 54.

<sup>145</sup> CRPD Committee, Views adopted by the Committee under article 5 of the Optional Protocol, concerning communication No. 7/2012, UN Doc. CRPD/C/16/D/7/2012 (2016).

<sup>146</sup> CRPD Committee, Views adopted by the Committee under article 5 of the Optional Protocol, concerning communication No. 18/2013, UN Doc. CRPD/C/22/D/18/2013, para. 9-10.

been committed to custody after being charged with common assault.<sup>147</sup> He complained of the violation of several rights including his rights under Articles 12, 13, 14, and 15 CRPD because he was declared unfit to stand trial and was denied his legal capacity.<sup>148</sup>

The jurisprudence of the European Court of Human Rights on legal capacity has so far been underdeveloped and inconsistent with the CRPD. This is emblematic of the difficulties that persons with disabilities experience in accessing justice in general – especially those who are formally barred from litigation as a result of the deprivation of their legal capacity.<sup>149</sup> Nonetheless, there have been several consequential cases that have been consistent with the CRPD.

In *Stanev v. Bulgaria*<sup>150</sup> the Court found a violation of Article 6(1) (right to a fair trial) of the ECHR as a result of the applicant being denied access to a court to seek the restoration of his legal capacity. It also found violations of Articles 3 (prohibition of torture and inhuman or degrading treatment), 5 (right to liberty and security) and 13 (right to an effective remedy). The applicant had been placed under partial guardianship and in a social care institution. The conditions of life in the social care institution were extremely poor, but Mr Stanev was not permitted to challenge his institutionalization without his guardian's consent to initiate legal proceedings.<sup>151</sup> In its decision, the Court referred to articles 12 and 14 CRPD, holding that an individual's right to ask a court to review his declaration of incapacity was critical for the person concerned. The Court also observed that his legal capacity would be decisive for the

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<sup>147</sup>Ibid. para. 1-2.7.

<sup>148</sup>Ibid. para. 3.5.

<sup>149</sup> The Court's former President, Sir Nicolas Bratza, has said that he had hoped the ruling in *Winterwerp v the Netherlands* (Application No. 6301/73, judgment 24 October 1979), 'would lead to a flowering of the Court's case-law on the Convention rights of persons with mental disabilities, the contrary proved to be the case: the jurisprudence of the Court in the succeeding twenty years is notable for the almost complete dearth of judicial decisions in this vitally important area'. See Lucy Series, 'Legal capacity and participation in litigation: Recent developments in the European Court of Human Rights', in *European Yearbook of Disability Law*, Lisa Waddington, Gerard Quinn and Eilionoir Flynn (Eds) (Volume 5, Intersentia 2015), p. 3.

<sup>150</sup> ECtHR, *Stanev v Bulgaria*, Application No. 36760/06, Judgment 17 January 2012, (2012), para. 241.

<sup>151</sup> See summary of the case <https://mdac.org/en/content/stanev-v-bulgaria-gc>.

exercise of all his rights and freedoms affected, in turn, by the declaration of incapacity.<sup>152</sup>

The Court clarified the meaning of deprivation of liberty on mental health's grounds in terms of article 5 of the Convention. It emphasized that a person may be considered "deprived of liberty" even in cases of stay in open access psychiatric hospitals. Indeed, the deprivation of liberty consists of an objective element - the confinement of the person and the additional subjective element - when the person "has not validly consented to the confinement in question."<sup>153</sup> In line with article 12 (3) CRPD, the Court further held that States carry positive obligations to protect liberty and decided that the situation of Mr Stanev amounted to an unlawful deprivation of liberty within the meaning of article 5(1) ECHR.<sup>154</sup>

In addition, the Court addressed the lack of possibilities to participate in the process and to access justice for those that have been denied their legal capacity.

In *Shtukaturov v. Russia*,<sup>155</sup> the Court held that there had been a violation of article 6 of the ECHR because the applicant had not been provided with an opportunity to participate in proceedings regarding the determination of his legal capacity. The Court also found a violation of articles 5 and 8 of the ECHR. The applicant had a "mental disorder", and was declared legally incapable by the Russian courts, and was confined in a psychiatric hospital against his will.<sup>156</sup>

Similarly, in *Nikolyan v. Armenia* the Court found that the applicant's lack of access to court in divorce and eviction proceedings, as well as in proceedings through which he had sought the restoration of his legal capacity, had breached article 6(1) of the

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<sup>152</sup> Stanev v. Bulgaria, Application No. 36760/06, Judgment 17 January 2012, (2012) para.241 and para. 5.

<sup>153</sup> Ibid, paras 116-117.

<sup>154</sup> Ibid. paras 121-132.

<sup>155</sup> ECtHR, *Shtukaturov v. Russia*, Application No. 44009/05, , Judgment of 27 March 2008.

<sup>156</sup> Ibid. para. 6-25.

ECHR.<sup>157</sup> In this case, the Court also referred to article 8 ECHR (right to respect for private life), finding that: “the domestic legal system did not differentiate between different degrees of incapacity for persons suffering from a mental disorder and did not provide for measures of protection tailored to the individual needs of the person concerned.”

Despite the finding of violations, in both *Shtukurov* and *Nikolyan*, the ECtHR recognizes the possibility of denial of the legal capacity of a person with a disability could in principle be permissible under the ECHR. This position conflicts directly with the much stricter approach of the CRPD, which, grounded in the social and human rights model of disability, correctly does not allow any limitation of the right to legal capacity.

In *N. v. Romania*,<sup>158</sup> the Court held that there had been a violation of article 8 (right to respect for family and private life) of the Convention in respect of the applicant being divested of his legal capacity and in respect of the change of his guardian. The applicant was diagnosed with paranoid schizophrenia, divested from legal capacity by the district court, and placed in a psychiatric hospital. The district court designed a guardian for the applicant, but then the applicant was moved to a closed care home, and a new guardian was appointed. The district court took this decision without involving the applicant in the proceeding.<sup>159</sup> The ECtHR observed that the decision of divesting the applicant of their legal capacity was taken in their interests, but it lacked an individual assessment of the applicant’s needs and wishes.<sup>160</sup> The Court also held that the change of the guardian had a legal basis and was taken in the applicant’s

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<sup>157</sup> ECtHR, *Nikolyan v. Armenia*, Application No. 74438/14, Judgment of 3 October 2019.

<sup>158</sup> ECtHR, *N. v. Romania (No.2)*, Application No. 38048/18, Judgment of 16 November 2021.

<sup>159</sup> *Ibid.* para. 10-25.

<sup>160</sup> *Ibid.* para. 58-66.

interests but it was not based on relevant and sufficient reasons, and appeared disproportionate.<sup>161</sup>

In some other cases, the Court addressed situations in which persons suffered the deprivation of liberty and did not have the possibility to defend themselves. For instance, in *Blokhin v. Russia*, the Grand Chamber of the ECtHR found a violation of article 6(1) (right to a fair trial) and article 3 (prohibition of torture and inhuman or degrading treatment), finding that the applicant's rights of defence had been violated.<sup>162</sup> The applicant – a 12 year old child with a mental and neurobehavioural disorder – had been questioned by the police without access to legal assistance and was not permitted to question the statements of two witnesses that served as a basis for his placement in temporary detention.<sup>163</sup>

In other cases, the lack of procedural safeguards prevented persons with disabilities from defending themselves and appealing decisions condemning them to deprivation of liberty. In *H.L. v. the United Kingdom*,<sup>164</sup> the Court found that the absence of procedural safeguards had resulted in a failure by the State to protect the applicant against arbitrary deprivation of liberty on grounds of necessity and, consequently, to comply with the essential purpose of article 5(1). The Court also found a violation of article 5(4) as there had been no procedure available to the applicant to have the lawfulness of their detention reviewed by a court.

In *Z.H. v. Hungary*, the Court found a violation of articles 3 and 5(2) of the Convention. Given the applicant's multiple disabilities, described by the Court as deafness, mutism,

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<sup>161</sup> Ibid. para. 67-76.

<sup>162</sup> ECtHR Grand Chamber, *Blokhin v. Russia*, Application No. 47152/06, Judgment of 23 March 2016, para. 216.

<sup>163</sup> Ibid. para. 10-54.

<sup>164</sup> ECtHR, *H.L. v. the United Kingdom*, Application no. 45508/99, Judgment of 5 October 2004.

and an intellectual disability, he had not been provided with the information required to enable him to challenge his detention.<sup>165</sup>

More recently, the European Court of Human Rights has affirmed the relevance and applicability of the CRPD. In particular, references to the CRPD are present in the judgments of *Stanev v. Bulgaria* (article 12 and 14),<sup>166</sup> *Nikolyan v. Armenia* (article 12),<sup>167</sup> or *Z.H. v. Hungary* (articles 2, 13, 14)<sup>168</sup> in order to guarantee respect for the right to liberty.

However, the legal standards developed through this jurisprudence do not seem to fully guarantee the level consistent with State obligations under the CRPD. While the ECtHR sets the requirements needed to avoid arbitrary detention on grounds of mental health, article 14.1 CRPD makes clear that “the existence of a disability shall in no case justify a deprivation of liberty.” Therefore, according to the CRPD, the detention of persons on the grounds of their mental disability would be arbitrary *per se*. Moreover, the ECtHR found violations of the ECHR on the basis of a lack of procedural guarantees in the proceedings to declare legal incapacity and it refers to different grades or degrees of legal incapacity (*Nikolyan v. Armenia*).<sup>169</sup> Article 12.2 CRPD provides that “persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life,” which does not leave room for denial of legal capacity irrespective of the grade or degree of a disability however it is determined.

The European Parliament Committee Report “Towards Equal Rights for Persons with Disabilities” makes a close link to the CRPD, referring directly to article 13, which requires States to ensure that persons with disabilities have “effective access to justice [...] on an equal basis with others’ through ‘the provision of procedural [...]

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<sup>165</sup> ECtHR, *Z.H. v. Hungary*, Application No. 28973/11, Judgment of 8 February 2013.

<sup>166</sup> ECtHR, *Stanev v Bulgaria*, Application No. 36760/06, Judgment 17 January 2012.

<sup>167</sup> ECtHR, *Nikolyan v. Armenia*, Application No. 74438/14, Judgment of 3 October 2019.

<sup>168</sup> ECtHR, *Z.H. v. Hungary*, Application No. 28973/11, Judgment of 8 February 2013.

<sup>169</sup> ECtHR, *Nikolyan v. Armenia*, Application No. 74438/14, Judgment of 3 October 2019.

accommodations, promoting appropriate training for those working in the field of the administration of justice.”<sup>170</sup> The report notes that “the existence of a disability does not in itself justify the denial of the legal capacity of persons with disabilities” and that “any measure restricting their legal capacity must be adapted to their circumstances and be proportionate to their needs, and should be applied only under certain conditions and with certain guarantees.”<sup>171</sup>

### *Guardianship*

Guardianship typically gives one person full legal capacity over another, meaning that all decision-making authority, standing and capacity is granted to someone else. This form of arrangement effectively strips persons with disabilities of their rights to make decisions, for instance, about where to live, where to work, and how to spend their money. Once guardianship is established, it is typically almost impossible to remove, as the individual who has been deprived of autonomy will have to prove they have the capacity to act on their own behalf.<sup>172</sup>

Guardianship arrangements are non-compliant with IHRL and standards, under which persons with disabilities must have their full legal capacity recognized at all stages of all legal proceedings and processes, whether civil or criminal.

Principle 6 of the International Principles prescribes that States:

“[r]epeal or amend all laws, regulations, policies, guidelines and practices that impose substituted decision-making in legal proceedings, including those that allow for the appointment of decision makers against the will of persons with disabilities (e.g. guardians ad litem, next friends and similar arrangements); or decisions made

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<sup>170</sup> European Parliament, REPORT Towards equal rights for persons with disabilities, 30.11.2022 - (2022/2026(INI)) [https://www.europarl.europa.eu/doceo/document/A-9-2022-0284\\_EN.html](https://www.europarl.europa.eu/doceo/document/A-9-2022-0284_EN.html), para. N.

<sup>171</sup> *Ibid.* para. O.

<sup>172</sup> UN ENABLE, “Handbook for Parliamentarians on the Convention on the Rights of Persons with Disabilities and its Optional Protocol,” (2007), HR/PUB/07/6, accessible [here Handbook for Parliamentarians on the Convention on the Rights of Persons with Disabilities | United Nations Enable.](https://www.un.org/development/desa/enable/handbook/)

on the basis of the ‘best interests’ of the persons concerned, as opposed to being based on their own will and preferences.”<sup>173</sup>

In its concluding observations on Croatia,<sup>174</sup> the CRPD Committee indicated that the State should take legislative measures to abolish substitute decision-making regimes. It also recommended that Croatia introduce legislation to provide a wide range of measures that respect the autonomy, will, and preferences of persons with disabilities, including their rights to give and withdraw their individual informed consent for medical treatment; to access justice; to vote; to marry; to full parental rights; and to work. It further recommended that Croatia take tangible steps to introduce systems of supported decision-making and, to this end, train social workers, legal professionals and public authorities on CRPD rights.

### *Challenges*

There are numerous challenges to the right to legal capacity of defendants with disabilities in EU Member States. Some of these are reflected in the EU Directives, Commission Recommendations and policy documents summarized above. Others, as indicated above, include shortcomings in the jurisprudence of the ECtHR. The continuing implementation of guardianship arrangements poses a significant obstacle to access to legal capacity.

A few country-specific situations exemplify these challenges.

In Lithuania, for purposes of civil law legal incapacity is usually determined exclusively in cases of mental health conditions and can be declared permanently.<sup>175</sup> Therefore, a

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<sup>173</sup> UN, Special Rapporteur on the Rights of Persons with Disability, International Principles and Guidelines on Access to Justice for Persons with Disabilities, Principle 6, para 62(j), p.21.

<sup>174</sup> Committee on the Rights of Persons with Disabilities, “Concluding Observations on the Initial Report of Croatia” (15 May 2015), CRPD/C/HRV/CO/1, accessible [here](#).

<sup>175</sup> Civil Code of the Republic of Lithuania, of July 18, 2000, Law No. VIII-1864 (as amended on April 12, 2011, No XI-1312), Article 2.10.1 “1. Natural person who as a result of mental illness or imbecility is not able to understand the meaning of his actions or control them may be declared incapable. The incapable person shall be placed under guardianship.”

decision to declare a person incapacitated may situate them for life. A decision made by the court is irreversible unless a guardian or other interested person successfully challenges the decision, which is still quite rare. In the criminal justice system, apart from the limitations outlined in the Criminal Procedure Code, the court must require the person's outpatient psychiatric examination when considering whether to recognize their restricted competence in particular areas and when using medical measures. A person may only be subject to an inpatient forensic psychiatric evaluation when the court is considering whether to declare them incapable.<sup>176</sup>

Similarly, in Portugal, the law guarantees that all persons have legal capacity through the scheme of an "accompanied adult."<sup>177</sup> The decision of the accompaniment lies with the court and it makes it possible to request the necessary accompanying measures.<sup>178</sup> These measures can be required by a court when it deems that the person is incapable of exercising their rights. The measures can be requested by the Public Prosecutor's Office, by the persons themselves or by the spouse, *de facto* partner, or other relative with the consent of the person with a disability in question.<sup>179</sup>

Numerous challenges have been identified across EU Member States linked to the right to participation in justice proceedings and the use of the guardianship model. One example is in Slovenia, where the lack of full participation of persons with disabilities in criminal proceedings is, in some cases, due to placing them under guardianship. This pertains particularly to those with intellectual and psychosocial disabilities. Instead

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<sup>176</sup> Mental Health Perspectives, [Briefing paper on barriers faced by defendants with intellectual and/or psychosocial disabilities in the Criminal Justice System in Lithuania](#), Vilnius, ENABLE project, 2023, p. 56.

<sup>177</sup> FENACERCI, [Briefing paper on barriers faced by defendants with intellectual and/or psychosocial disabilities in the Criminal Justice System in Portugal](#), Lisboa, p. 24.

<sup>178</sup> According to articles 138 and 140(1) of the Civil Code, the accompanying measures are measures aimed at ensuring the well-being and recovery of persons with disabilities, as well as the full exercise of all their rights and the fulfillment of their duties, through the assistance or representation of a person appointed for this purpose as an accompanying person. According to Article 147 of the Civil Code, in exceptional cases, the exercise of personal rights and the capacity to enter into ordinary business transactions can be limited.

<sup>179</sup> FENACERCI, [Briefing paper on barriers faced by defendants with intellectual and/or psychosocial disabilities in the Criminal Justice System in Portugal](#), Lisboa, ENABLE project, 2023, p. 15.

of supporting persons with disabilities in legal proceedings and empowering them to participate, guardians usually work as “substitutes.”<sup>180</sup>

### **Right to equal participation**

Ensuring the formal protection of legal capacity for persons with disabilities is not by itself enough to guarantee to everyone the equal possibility to participate in the process. Everyone, including those accused of criminal offences and victims of crime, has a right to equal access to proceedings in the administration of justice, without discrimination.<sup>181</sup> The obligation to respect this right requires States to establish and resource courts and to ensure that they are able to conduct fair trials, including in pre-trial context. Such courts must be located in places which are accessible to people throughout the country, and the infrastructure for court buildings must be physically accessible to persons with disabilities. The availability of effective legal assistance determines whether a person can protect their rights, participate in proceedings in a meaningful way, or access justice through the courts.<sup>182</sup>

For persons with disabilities to exercise their right to access to justice (article 13), they must enjoy the right to participate on an equal basis with others in the justice system as a whole. This participation takes many forms and includes persons with disabilities assuming the roles of, for example, claimants, victims or survivors, defendants, judges, jurors and lawyers, as part of the democratic system that contributes to good governance.<sup>183</sup>

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<sup>180</sup> PiC, [Briefing paper on barriers faced by defendants with intellectual and/or psychosocial disabilities in the Criminal Justice System in Slovenia](#), Ljubljana, ENABLE project, 2023, p. 22.

<sup>181</sup> Article 8 of the Universal Declaration, Articles 2, 3, 14(1) and 26 of the ICCPR, Articles 2 and 15 of CEDAW, Articles 5-6 of the Convention against Racism, Articles 13 (and 9) of the Convention on Persons with Disabilities, HRC General Comment 32, §§8-11; *Good v. Republic of Botswana* (313/05).

<sup>182</sup> 2 HRC General Comment 32, §10; See *Golder v. United Kingdom* (4451/70), ECtHR (1975).

<sup>183</sup> Committee on the Rights of Persons with Disabilities, ‘General Comment No. 7 (2018) on the participation of persons with disabilities, including children with disabilities, through their representative organizations, in the implementation and monitoring of the Convention’, CRPD/C/GC/7 (9 November 2018), para. 81.

The right to participate applies to all persons, including persons with disabilities, even where such an individual is found not criminally responsible due to their disability in terms of the provision of a domestic law. Persons with disabilities should at all times and in all circumstances be effectively included and heard in the proceedings.

## **International Principles and Guidelines on Access to Justice for Persons with Disabilities**

### **Principle 7**

**“Persons with disabilities have the right to participate in the administration of justice on an equal basis with others.”<sup>184</sup>**

Under Principle 7, Governments, legislatures and other authorities must each, within their respective roles, take the following actions:

- Remove barriers that prevent or discourage persons with disabilities from entering justice system-related professions;
- Remove all disability-related barriers, including laws, that prevent persons with disabilities from being judges or jurors or serving in any other justice related positions;
- Ensure the equal participation of persons with disabilities in the jury system by providing all necessary support, reasonable accommodations and procedural accommodations;
- Consult closely with and actively involve persons with disabilities and their representative organizations in all discussions and decision-making about justice-related issues.

### *„Insanity” defence, „unfitness” to stand trial*

The CRPD Committee has made clear that the application of concepts and standards such as “unfitness to stand trial” and “insanity defences” are discriminatory and in violation of the Convention. The Committee has therefore called for the removal of all

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<sup>184</sup> UN, Special Rapporteur on the Rights of Persons with Disability, International Principles and Guidelines on Access to Justice for Persons with Disabilities, Principle 7.

such standards from criminal justice systems in State Parties to the CRPD.<sup>185</sup> Declarations of “unfitness to stand trial or non-responsibility or incapacity in criminal justice systems are not only discriminatory, but may lead to the arbitrary detention of persons based on their disabilities, contrary to article 14 of the CRPD.<sup>186</sup>

The CJEU has affirmed that judicial proceedings which allow for the application of an “insanity defence” which resulted in a person with a disability being placed in a psychiatric hospital purportedly for therapeutic and security reasons was non-compliant with the EU Charter.<sup>187</sup> The Court found that this was impermissible absent a finding from a court verifying that certain procedural rights of a person with a disability had been respected.<sup>188</sup> The case concerned a Bulgarian man with paranoid schizophrenia, who was accused of killing his mother. The Public Prosecutor’s Office closed the criminal proceeding against him and ordered his placement in a psychiatric hospital, assuming that he had committed the crime in a state of mental disorder and he could not be held criminally responsible. The decision at the national level was taken without questioning the person and without granting him basic procedural safeguards such as access to a lawyer or the possibility of judicial review.<sup>189</sup>

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<sup>185</sup> UN OHCHR, ‘Report - Right to access to justice under article 13 of the Convention on the Rights of Persons with Disabilities’ (December 2017), A/HRC/37/25, para. 35.

<sup>186</sup> Committee on the Rights of Persons with Disabilities, ‘Guidelines on article 14 of the Convention on the Rights of Persons with Disabilities – The right to liberty and security of persons with disabilities’ (September 2015), para. 16.

<sup>187</sup> Ruling dated 19.09.2019 of the CJEU, case C-467/2018, available here: <https://curia.europa.eu/juris/document/document.jsf?docid=217905&mode=req&pageIndex=1&dir=&occ=first&part=1&text=&doclang=EN&cid=2144006>.

<sup>188</sup> Interpretation by the CJEU on Art. 47 of the Charter of Fundamental Rights of the European Union as well as Art. 8, para 2 of Directive 2012/13/EU and Art. 12 of Directive 2013/48/EU, point 2 of the Ruling.

<sup>189</sup> Ruling dated 19.09.2019 of the CJEU, case C-467/2018, available here: <https://curia.europa.eu/juris/document/document.jsf?docid=217905&mode=req&pageIndex=1&dir=&occ=first&part=1&text=&doclang=EN&cid=2144006>, para. 21-31.

**Eliminating the insanity defence and non-imputability<sup>190</sup>**

The non-culpability defence, often referred to as the “insanity defence,” requires the fact-finder to decide if the defendant had the mental capacity to commit the charged offence. Without it, the person is considered to lack moral responsibility for the act. This requires a look backwards to the time of the offence. Like the capacity to stand trial, the insanity defence is deeply entrenched in the medical model of disability. Psychiatrists provide expert testimony in most cases in which the insanity defence is raised.<sup>191</sup>

A defendant who has been determined not to have had the mental capacity to commit the crime, usually faces a period of forced institutionalization. The defendant is often detained in a forensic psychiatric facility, or, sometimes, in a prison or jail. In some jurisdictions, the laws, as well as the customs or practices, allow the detention of the defendant for an indefinite period.<sup>192</sup> In this context, the period of forced institutionalization occurs without any proof of guilt of the defendant, outside of the process, and without procedural safeguards.

Sweden abolished the insanity defence in 1965. Swedish law recognizes *mens rea* (meaning intent or “guilty mind”) as an element of a crime, but provides that a defendant’s mental status may not be considered in the determination of guilt. Rather, a person’s mental disability may be considered in sentencing. A guilty defendant with a psychosocial disability may, therefore, be committed to a forensic facility for treatment. The term of the institutionalization is indefinite, but the individual must be released when the requirements for involuntary psychiatric treatment are no longer met.

Therefore, although defendants in Sweden have the right to have their cases adjudicated, and an opportunity to force the government to prove its case, the

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<sup>190</sup> Access to Justice Knowledge Hub, Implementing the Convention on the Rights of persons with disabilities in criminal justice systems, A briefing paper, July 2022.

<sup>191</sup> Ibid. 14.

<sup>192</sup> Ibid. 14.

outcome – indefinite institutionalization – may be the same as for defendants who successfully use the insanity defence in nations that allow it.<sup>193</sup>

In its concluding observations to Belgium, the CRPD recommended changes to laws to guarantee that persons with disabilities “who have committed a crime [...] be tried under the ordinary criminal procedure, on an equal basis with others and with the same guarantees, although with specific adjustments to ensure their equal participation in the criminal justice system.”<sup>194</sup> In 2009, the High Commissioner for Human Rights wrote that recognition of the legal capacity of persons with disabilities requires replacing criminal defences based on “mental or intellectual disability” with “disability-neutral” doctrines.<sup>195</sup> Consult closely with and actively involve persons with disabilities and their representative organizations in all discussions and decision-making about justice-related issues.

### *Challenges*

In many EU Member States, the insanity defence is still used and defendants with disabilities are placed in medical confinement. For instance, in Romania<sup>196</sup> legislation provides for medical confinement as a safety measure for persons determined to be without legal capacity who have committed a criminal offence.<sup>197</sup>

Bulgarian law provides that persons who have acted in a state of “insanity” cannot be considered criminally liable because they were not able to understand what they were

<sup>193</sup> Piers Gooding & Tova Bennett, *The Abolition of the Insanity Defence in Sweden and the United Nation’s Convention on the Rights of persons with Disabilities: Human Rights Brinkmanship or Evidence it Won’t Work?* 21 *New Criminal L. Rev.* 141 (2018) available at <https://online.ucpress.edu/nclr/article/21/1/141/68831/The-Abolition-of-the-Insanity-Defense-in-Sweden>, in: *Implementing the Convention on the Rights of persons with disabilities in criminal justice systems*, A briefing paper, July 2022.

<sup>194</sup> CRPD/C/BEL/CO/1 paragraph 28 available at [https://tbinternet.ohchr.org/\\_layouts/15/treatybodyexternal/Download.aspx?symbolno=CRPD%2fC%2fBEL%2fCO%2f1&Lang=en](https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CRPD%2fC%2fBEL%2fCO%2f1&Lang=en). See also CRPD/C/TKM/CO/1, paragraph 30(b); CRPD/C/DEU/CO/1, 32(a) and (b).

<sup>195</sup> UN Human Rights Council, annual report of the UN High Commissioner for Human Rights and reports of the High Commissioner and the UN Secretary General, UN doc. A/hrc/10/48 at 15 (26 January 2009) <https://www2.ohchr.org/english/bodies/hrcouncil/docs/10session/A.HRC.10.48.pdf>.

<sup>196</sup> Centre for Legal Resources, *Briefing paper on barriers faced by defendants with intellectual and/or psychosocial disabilities in the Criminal Justice System in Romania*, Bucharest, ENABLE project, 2023, p.24.

<sup>197</sup> Romanian Criminal Procedure Code article 184 para. (27), “(27) If during the conducting of a forensic psychiatric expert report, it is found that the requirements set by Art. 247 are met, the forensic psychiatric examination committee shall notify the judicial bodies in order for them to take the safety measure of temporary medical admission.”, text available at [CDL-REF\(2018\)043-e \(coe.int\)](https://www.coe.int/).

doing or to control their actions.<sup>198</sup> If the person is proven to be “insane” at the moment that the alleged offence was committed, the trial ends.

Similar laws on the insanity defence apply in the Czech Republic. While the State Prosecutor’s Office asserts<sup>199</sup> that there is the possibility to appoint an expert during the assessment of whether a defendant can be held criminally responsible, this solution appears problematic when the assessed person has not yet been accused, as the defence rights are not guaranteed prior to official charges, and accordingly, the person is not yet entitled, for example, to object to the expert witness.<sup>200</sup>

In Spain, the insanity defence can amount to “procedural impunity” when the persons involved are considered to not be capable of understanding both the act they have been alleged to have committed and the relevant legal process. Under the Spanish system, these persons cannot participate in the proceedings. In these cases, there is a free dismissal, which means that the individual is released without any security measure, and the case is transferred to the civil sphere. The free dismissal is the consequence of a legal loophole. Indeed, the Spanish legal framework provides for the possibility for the criminal court to apply custodial or non-custodial security measures when a person committed an act foreseen as a crime and the act and the personal circumstances of the subject reveal the probability of committing new crimes. Examples of custodial security measures are the placement in a psychiatric institution, rehabilitation center, or special educational institution. However, the Spanish Constitution (article 25) provides that a security measure implying deprivation of liberty

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<sup>198</sup> Bulgarian Criminal Code article 33 para.1 “(1) Penally responsible shall not be a person, who has acted in a state of insanity - where due to retarded mentality or derangement of his consciousness of prolonged or short duration, the person has not been able to understand the nature and meaning of the act or to manage his actions.” Text available at [BULGARIA\\_Criminal Code.pdf \(ohchr.org\)](#).

<sup>199</sup> Statement of the Supreme State Prosecutor’s Office of 30 June 2014, No. 1 SL 708/2014.

<sup>200</sup> FORUM, [Briefing paper on barriers faced by defendants with intellectual and/or psychosocial disabilities in the Criminal Justice System in Czechia](#), Praha, ENABLE project, 2023, p. 31.

cannot be imposed by civil administration and without a sentence. In these above mentioned circumstances there can be no sentence, because the procedure ended.<sup>201</sup>

In the above-mentioned States, the determination of the “insanity” of the defendant takes place,<sup>202</sup> in violation of the CRPD, without the requirement to provide support for an individual with a disability in the relevant processes.

### *Practical guidance and recommendations*

- 1. State justice actors must, within the parameters of their respective responsibilities, ensure that they accord persons with disabilities equal treatment with others in interactions with the justice system. Responsible authorities must provide persons with disabilities with procedural and reasonable accommodations where needed to facilitate their participation on an equal basis.**
  - A. Justice actors should interpret existing laws and policies consistently with the CRPD.
  - B. Justice actors should act to ensure that procedural accommodations and other supports to facilitate their effective participation are provided for persons with disabilities, where necessary.
- 2. Responsible justice actors should respect and ensure the effective right to participate from the first contact with law enforcement, during the proceedings and in all following stages of it.**
  - A. The right encompasses access to counsel and, where necessary, legal aid, and the accompaniment of support persons of the defendant's

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<sup>201</sup> Plena Inclusión, [Briefing paper on barriers faced by defendants with intellectual and/or psychosocial disabilities in the Criminal Justice System in Spain](#), Madrid, ENABLE project, 2023, p. 58.

<sup>202</sup> Centre for Legal Resources, [Briefing paper on barriers faced by defendants with intellectual and/or psychosocial disabilities in the Criminal Justice System in Romania](#), Bucarest, ENABLE Project, 2023, p. 25; KERA Foundation, [Briefing paper on barriers faced by defendants with intellectual and/or psychosocial disabilities in the Criminal Justice System in Bulgaria](#), Veliko Tarnovo, ENABLE Project, 2023, p. 25; Plena Inclusión, [Briefing paper on barriers faced by defendants with intellectual and/or psychosocial disabilities in the Criminal Justice System in Spain](#), Madrid, ENABLE Project, 2023, p. 30.

choosing in all stages of criminal proceedings, starting from the first contact with law enforcement.

- B. No person with a disability should be compelled to have a person assisting them without them being able to voice their preferences or without their consent.

**3. Responsible justice actors should ensure safe, fair and effective engagement of persons with disabilities in the proceedings and the opportunity to fully participate in proceedings.**

4. The responsibility includes the provision of adjustments, accommodations and supports, including intermediaries, support services, or support persons, wherever and whenever needed, to enable clear communication among and between persons with disabilities and courts, **Responsible justice actors should implement a supported decision-making approach, whereby a person with a disability continues to hold all decision-making authority and autonomy. Judges should always ensure direct contact with the defendant with a disability even where others are included in such contact to provide that person with support.**

- A. If a petition for guardianship is made, it should be denied on the grounds of violating the person's individual autonomy.

- B. **The role of an intermediary or a lawyer must not** replace the direct contact of the defendant with the judge.

**5. Lawyers should ensure that decisions that directly or indirectly involve participation in the proceedings of the defendant with a disability, are with the defendant.**

- A. The supported decision-making model for defendants with disabilities means that the defendant with a disability is the person making the decision. If they choose to include a support person, the work of the

support person is to ensure the decision is made at the defendant's will and preference.

6. Justice actors must ensure that **constructs such as “cognitive incapacity” and “mental incapacity,”** as determined, for instance, by functional or mental status assessments, are not used to restrict a person's right to legal capacity.
7. If a defendant with a disability is determined, after the provision of all necessary support to participate in a complete legal process to **lack the necessary intent** (mens rea) within the usual meaning of the term, they should be treated the same way as any other defendant who lacks intent.<sup>203</sup>
8. Justice actors must ensure that **any assessments** conducted in respect of defendants with disabilities before and during court proceedings are **aimed only at determining the procedural accommodation and support** required to ensure their full and effective participation in the proceedings. Such assessments must have the will and preference of the individual with a disability as their central focus.

### *Systemic Recommendations*

1. **Persons with disabilities must have equal access to the proceedings and to the defence.**
  - A. **A system of support services** and procedural accommodations to **ensure effective participation** of persons with disabilities in proceedings and trials must be developed and implemented in practice (*see below the details on procedural accommodations*), from the first **stages** of the criminal justice process, and throughout the proceedings.<sup>204</sup>

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<sup>203</sup> Access to Justice Knowledge Hub, Implementing the Convention on the Rights of persons with disabilities in criminal justice systems, A briefing paper, July 2022, p. 19.

<sup>204</sup> Access to Justice Knowledge Hub, Implementing the Convention on the Rights of persons with disabilities in criminal justice systems, A briefing paper, July 2022, p. 19.

- B. From the earliest stages of the proceedings, **identification** of the needs for procedural accommodations and supports must take place (*see [section IV.1.2 Process for individual assessment for adoption of procedural accommodations](#) below*). Procedural accommodations should be present before, during and after the termination of proceedings to prevent discrimination **and throughout all processes**.
  - C. A **monitoring mechanism** should be put in place in order to monitor whether procedural accommodations are being used and complied with.
- 2. Recognize and assume the full legal capacity and right of defendants with disabilities to participate in all stages of the proceedings and in all courts.**
- A. Ensure that defendants who have been previously **declared to be without legal capacity** to participate in court proceedings have the right to appeal or otherwise seek restoration of their legal capacity and have access to accommodations and supports, as well as legal assistance to participate in court proceedings.
  - B. Judges and other relevant justice actors should bring to the attention of the lawmakers any legislation that is in violation of the CRPD.

### **Promising Practice**

In Spain, Law 8/2021<sup>205</sup> recognized legal capacity for all people with disabilities, guardianship was eliminated, and judicial measures of support for people with disabilities are adopted as a last resort. In this way, the Spanish legislation moved from a system of substitution of decision-making to a system of support in decision-making.

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<sup>205</sup> Law 8/2021, Ley de 2 de junio, por la que se reforma la legislación civil y procesal para el apoyo a las personas con discapacidad en el ejercicio de su capacidad jurídica, «BOE» No. 132, 3 June 2021.

- C. Where possible under the national legal system, the judges may initiate proceedings for review of the validity of the legislation incompatible with the CRPD.

### **Promising Practice**

For instance, judges in Slovakia may start proceedings before the Constitutional Court to strike down the legislation.

- 3. **A review of policies, guidelines and practices should be undertaken by State authorities.**
  - A. States shall review and, where necessary eliminate or revise policies, guidelines and practices that serve directly or indirectly restrict the legal capacity of persons with disabilities, including those that contain and apply doctrines of “**unfitness to stand trial**” and “**incapacity to plead**”, which prevent persons with disabilities from participating in legal processes based on questions about or determinations of their capacity;
  - B. States shall review and where necessary eliminate or revise policies, guidelines and practices that authorize **medical professionals** to be the sole or preferred “experts” in determining how and to what extent and with what support persons with disabilities can participate in legal proceedings;
  - C. States shall review and where necessary eliminate or revise policies, guidelines and practices, including court orders, that subject defendants with disabilities to **detention** (whether in a prison, a mental health facility or any other institution) for a definite or indefinite term based on perceived “dangerousness” or need for care that arises from the condition of disability.
- 4. **States should develop community-based support and services to replace institutionalization, security measures or forced medical and psychiatric treatment in institutions.**
- 5. States should take measures to improve the current process for **exchanging medical records** in order to establish a clear system for passing on information

as individuals move through the criminal justice system, which is essential to minimize errors and guarantee appropriate care and medication access.<sup>206</sup>

6. **States should collect disaggregated data** on the participation of persons with disabilities in the justice system and, using that data, develop and implement strategies to reform policies, practices and laws to ensure equal access to justice.
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<sup>206</sup>Mental Health Perspectives, [Briefing paper on barriers faced by defendants with intellectual and/or psychosocial disabilities in the Criminal Justice System in Lithuania](#), Vilnius, ENABLE Project, 2023, p. 60.

## **B. Restorative justice principles**

Restorative justice is an important and increasingly recognized approaches to overall questions of justice. There is no single accepted definition of restorative justice. A first step towards restorative justice was taken through the ECOSOC Resolution 2002/12 which focused on restorative justice programmes in criminal matters.<sup>207</sup> In particular, this Resolution recommends for the consideration of the States the UN Basic Principles on the use of restorative justice programs in criminal matters. These principles define the restorative process supporting restorative justice as

“[...] any process in which the victim and the offender, and, where appropriate, any other individuals or community members affected by a crime, participate together actively in the resolution of matters arising from the crime, generally with the help of an intermediary. Restorative processes may include mediation, conciliation, conferencing and sentencing circles.”<sup>208</sup>

A restorative justice process can be applied at any stage of legal proceedings, including at the post-sentencing stage. The outcome of a restorative justice process may be to provide alternatives to imprisonment, as part of or in addition to a non-custodial sentence, but also during imprisonment or after release from prison.<sup>209</sup>

The CRPD Committee has stated in relation to the right to liberty that “deprivation of liberty in criminal proceedings should only apply as a matter of last resort and when other diversion programmes, including restorative justice, are insufficient to deter

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<sup>207</sup> Economic and Social Council, ECOSOC Resolution 2002/12 Basic principles on the use of restorative justice programmes in criminal matters (2002), available at: <https://www.un.org/en/ecosoc/docs/2002/resolution%202002-12.pdf>

<sup>208</sup> United Nations Economic and Social Council, ECOSOC Resolution 2002/12 Basic principles on the use of restorative justice programmes in criminal matters, para. 2.

<sup>209</sup> U.N. Office on Drugs & Crime, handbook on restorative justice programmes (2006), available at [https://www.unodc.org/pdf/criminal\\_justice/06-56290\\_Ebook.pdf](https://www.unodc.org/pdf/criminal_justice/06-56290_Ebook.pdf), p. 41.

future crime.”<sup>210</sup> A restorative justice approach is therefore preferred by the Committee.

More recently, in its Guidelines on Deinstitutionalization, including emergencies, the CRPD Committee stated that State parties:

“(...)should provide individualized, accessible, effective, prompt and participatory pathways to access to justice for persons with disabilities who wish to seek redress, reparations and restorative justice, and other forms of accountability (...).”<sup>211</sup>

The Council of Europe Recommendation CM/Rec (2018) 8 concerning restorative justice in criminal matters defines “restorative justice” as: “any process which enables those harmed by crime, and those responsible for that harm, if they freely consent, to participate actively in the resolution of matters arising from the offence, through the help of a trained and impartial third party. Restorative justice often takes the form of a dialogue (whether direct or indirect) between the victim and the offender, and can also involve, where appropriate, other persons directly or indirectly affected by a crime. This may include supporters of victims and offenders (...).”<sup>212</sup>

The Recommendation is addressed to public and private agents or entities which operate in the domain of criminal justice, and which deliver or refer cases for restorative justice, or which may otherwise be able to utilize restorative justice or to apply its principles to their work. Judicial authorities and criminal agencies should create the conditions, procedures and infrastructures to refer the cases to restorative justice agencies when possible. The Recommendation also identifies the need for “risk assessment” in the context of preparation for the use of restorative justice

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<sup>210</sup> Committee on the Rights of Persons with Disabilities, ‘Guidelines on article 14 of the Convention on the Rights of Persons with Disabilities – The right to liberty and security of persons with disabilities’ (September 2015), para. 21.

<sup>211</sup> CRPD Committee, Guidelines on Deinstitutionalization, including emergencies, UN Doc. CRPD/C/5 (2022).

<sup>212</sup> Recommendation CM/Rec(2018) 8, paras 3-4.

measures.<sup>213</sup> This risk assessment is then related to the requirement of ensuring impartiality, dignity of the parties, and their effective participation.<sup>214</sup>

### **International Principles and Guidelines on Access to Justice for Persons with Disabilities<sup>215</sup>**

Guideline 1.2.k of Principle 1 on Legal Capacity enjoins States to:

“establish or support alternative justice mechanisms, such as restorative justice, alternative dispute resolution mechanisms, and cultural and social forms and forums of justice, that are available to persons with disabilities on an equal basis with others, without regard for any construct of capacity to participate.”

Guideline 8.2.d of Principle 8 deals with the rights to report complaints and to initiate legal proceedings. It indicates that States shall “[p]rovide voluntary **alternative dispute resolution mechanisms**, such as conciliation, mediation, arbitration and **restorative justice**.”

Restorative justice, delivered appropriately and fairly, is an important alternative to or adjunct within the criminal justice system for persons with disabilities. Certainly, if restorative programs are offered to offenders and victims generally, they should be equally available to persons with disabilities on an equal basis with all others.

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<sup>213</sup> Rule 28 and 29, [Recommendation CM/Rec\(2018\) 8](#).

<sup>214</sup> See especially Rules 46 and 47, [Recommendation CM/Rec\(2018\) 8](#): „Restorative justice should be performed in an impartial manner, based on the facts of the case and on the needs and interests of the parties. The intermediary should always respect the dignity of the parties and ensure that they act with respect towards each other. Domination of the process by one party or by the intermediary should be avoided; the process should be delivered with equal concern for all parties.; Restorative justice services are responsible for providing a safe and comfortable environment for the restorative justice process. The intermediary should take sufficient time to prepare the parties for their participation, be sensitive to any of the parties’ vulnerabilities and, if necessary to ensure the safety of one or more parties, discontinue restorative justice.”

<sup>215</sup> UN, Special Rapporteur on the Rights of Persons with Disability, *International Principles and Guidelines on Access to Justice for Persons with Disabilities* (2020).

## **Systemic Recommendations**

1. Alternatives to traditional criminal justice systems, such as through restorative justice processes and principles, should be implemented across the criminal justice systems and be equally accessible to persons with disabilities.<sup>216</sup>
    - A. Alternative systems should ensure that defendants with disabilities are provided whatever accommodations and supports are needed to participate equally.
    - B. Restorative justice should be included in legal studies curricula, as well as in trainings for justice actors. (See also further below in training)
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<sup>216</sup> KERA Foundation, [Briefing paper on barriers faced by defendants with intellectual and/or psychosocial disabilities in the Criminal Justice System in Bulgaria](#), Veliko Tarnovo, ENABLE Project, 2023, p. 68.

## C. Training of professionals

The training of justice actors is vital to effectively provide for access to justice and the protection of the rights of persons with disabilities in justice processes and procedures. Without such training, evidence and practical experience suggest that in many countries, justice actors may be unaware of the legal rights of persons with disabilities; uninformed about disability more generally; and incapable of providing the accommodations and support required for persons with disabilities to enjoy access to justice on an equal basis.

The Enable project national studies have confirmed that training for justice actors is greatly needed in all the target countries.<sup>217</sup> The development and investment in such training is an important way to promote more accessible justice systems for persons with disabilities.

The UN OHCHR has stressed that:

“States must also seek to overcome barriers in access to justice by providing training to judicial officers, lawyers and others, including forensic experts, prison staff and the police, on the human rights of persons with disabilities.”<sup>218</sup>

It is therefore clear that comprehensive training of the widest range of justice actors possible is desirable. As Principle 10 of the International Principles affirms:

“[all] those working in the justice system must be provided with awareness-raising and training programmes addressing the rights of persons with disabilities, in particular in the context of access to justice.”<sup>219</sup>

According to the EU 2013 Recommendation on procedural safeguards for “vulnerable” persons suspected or accused in criminal proceedings,<sup>220</sup> police officers, law enforcement and judicial authorities competent in criminal proceedings conducted against “vulnerable” persons should receive specific training in this regard. This

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<sup>217</sup> Pléna Inclusión, [Briefing paper on barriers faced by defendants with intellectual and/or psychosocial disabilities in the Criminal Justice System in Spain](#), Madrid, ENABLE Project, 2023, p. 53; FORUM, [Briefing paper on barriers faced by defendants with intellectual and/or psychosocial disabilities in the Criminal Justice System in Czechia](#), Praha, ENABLE Project, 2023, p. 67; KERA Foundation, [Briefing paper on barriers faced by defendants with intellectual and/or psychosocial disabilities in the Criminal Justice System in Bulgaria](#), Veliko Tarnovo, ENABLE Project, 2023, p. 53.

<sup>218</sup> UN OHCHR, ‘Report - Right to access to justice under article 13 of the Convention on the Rights of Persons with Disabilities’ (December 2017), A/HRC/37/25, para. 66.

<sup>219</sup> UN Special Rapporteur on the Rights of Persons with Disability, *International Principles and Guidelines on Access to Justice for Persons with Disabilities* (2020).

<sup>220</sup> Commission Recommendation 2013/C-378/02 on procedural safeguards for vulnerable persons suspected or accused in criminal proceedings, para. 17.

Recommendation should be understood and interpreted in the context of IHRL and standards pertaining to the rights of persons with disabilities.

By educating themselves on how different disabilities present themselves and the struggles that come with them, justice actors (including judges) may be equipped to:

- A. Better empathize with the person in question;
- B. Better recognize if any discrimination happens inside or outside of the courtroom;
- C. Better guide the processes by which disabilities are identified and supports and accommodations for persons with disabilities are provided.

### **Promising Practice**

In Spain, the Ministry of Justice's Center for Legal Studies offers a six-month online training course on "Disability Attention in the Administration of Justice". The course is open to all the professionals trained at the Center for Legal Studies, and it has an unlimited number of spots.<sup>221</sup>

In Romania, the CLR (Center for Legal Rights), in partnership with the Public Prosecutor's Office of the High Court of Cassation and Justice, and with the support of the Ministry of Justice, organizes multidisciplinary training courses for legal and psychosocial specialists including magistrates, lawyers, psychologists, social workers, and psychiatrists (AdaptJust courses).<sup>222</sup>

In Portugal, regular training activities are organized at the local level by a working group composed of police officers, local disability organizations, representatives from the municipality and the local health system. The working group constitutes an interesting network for different actors for the exchange of information and the development of appropriate and flexible solutions to local problems.<sup>223</sup>

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<sup>221</sup> Pléna Inclusión, [Briefing paper on barriers faced by defendants with intellectual and/or psychosocial disabilities in the Criminal Justice System in Spain](#), Madrid, ENABLE Project, 2023, p. 24.

<sup>222</sup> Centre for Legal Resources, [Briefing paper on barriers faced by defendants with intellectual and/or psychosocial disabilities in the Criminal Justice System in Romania](#), Bucarest, ENABLE Project, 2023, p. 18-19.

<sup>223</sup> FENACERCI, [Briefing paper on barriers faced by defendants with intellectual and/or psychosocial disabilities in the Criminal Justice System in Portugal](#), Lisbon, ENABLE Project, 2023, p. 34.

## **Systemic Recommendations**

1. States should provide, periodic and high quality training, on a mandatory basis, to justice actors.
  - A. Develop a consistent and **coordinated training plan** regarding disability issues targeting the different justice system professionals.
  - B. Create a **system of ongoing mandatory training** for justice actors who interact with persons with intellectual and/or psychosocial disabilities:<sup>224</sup>
    - i. For judges, legal practitioners and police personnel there should be a focus on the **human rights-based model of disability, on access to justice, procedural accommodations, identification of persons with disabilities, and on communication** with all persons with disabilities including persons with intellectual and/or psychosocial disabilities
    - ii. For all justice actors, there should be focus on **how to communicate with a person with disability, on the impact of detention and medical treatment of persons with disabilities** and how in particular medication affects them in court, or a hearing. (These include, for example, slow responses or the fact that hearings should not be scheduled shortly after the person received medical treatment.).
2. States should guarantee **effective participation of persons with disabilities in training.**
  - A. Persons with disabilities **should be involved in the development and training of justice actors**, including, for the purpose of facilitating a better

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<sup>224</sup>Centre for Legal Resources, [Briefing paper on barriers faced by defendants with intellectual and/or psychosocial disabilities in the Criminal Justice System in Romania](#), Bucharest, ENABLE Project, 2023, p. 36.

understanding by justice actors of the experiences of persons with disabilities in legal processes.

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## **D. Right to liberty, fair trial and pre-trial rights**

Lack of procedural accommodations in pre-trial and trial procedures violates the **right to a fair trial** and may lead to effective exclusion from proceedings and/or being subjected to unfair sentences.<sup>225</sup>

A person will come into contact with the justice system from the moment of arrest and deprivation of liberty. Article 9.3 of the ICCPR requires that

“Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgement.”

Moreover, article 9.4 provides that

“Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.”

Detailed clarifications of these provisions are contained in the Human Rights Committee’s General Comment 35.<sup>226</sup>

The ECHR also introduces procedural safeguards in case of detention. First, article 5.2 introduces the right of the defendants to be informed in a language that they know about the reasons of the arrest and the charges. Moreover, article 5.3 states that

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<sup>225</sup> UN OHCHR, ‘Report - Right to access to justice under article 13 of the Convention on the Rights of Persons with Disabilities’ (December 2017), A/HRC/37/25, para. 31.

<sup>226</sup> UN Human Rights Committee, General Comment No. 35. Article 9 (Liberty and security of person), CCPR/C/GC/35 (2014),

“Everyone arrested or detained in accordance with the provisions of paragraph 1 (c) of this article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.”

Article 5.4 ECHR adds that

“Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.”

Article 14 of the ICCPR provides that everyone is entitled to a fair and public hearing by a competent, independent, and impartial tribunal established by law.<sup>227</sup> It further provides that everyone shall be entitled to be informed, promptly and in detail, in a language which one understands and to have adequate time and facilities for the preparation of their defence and to communicate with counsel of their own choosing. Trials must also be conducted without undue delay and free assistance of an interpreter must be provided if one cannot understand or speak the language used in court. No person should be compelled to testify against themselves or to confess guilt.<sup>228</sup> Specific safeguards applies also at pre-trial phases.<sup>229</sup> As highlighted by the General Comment No. 35, persons in pre-trial detention have the right to see their cause brought to trial with undue delay applies.<sup>230</sup> Moreover, pre-trial detention should be employed only after an individual assessment and it should never be an automatic

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<sup>227</sup> International Covenant on Civil and Political Rights (1966), accessible [here](#).

<sup>228</sup> International Covenant on Civil and Political Rights (1966), accessible [here](#).

<sup>229</sup> UN Human Rights Committee, General Comment No. 35. Article 9 (Liberty and security of person), CCPR/C/GC/35 (2014), para. 37.

<sup>230</sup> *Ibid*, para. 38.

and mandatory solution. Detailed clarifications of these rights are contained in the Human Rights Committee's General Comment No. 32.<sup>231</sup>

Article 6.1 of the European Convention of Human Rights similarly provides that everyone is entitled to a fair and public hearing by a tribunal established by law.<sup>232</sup> Moreover, article 6.2 ECHR introduces the presumption of innocence until proved guilty and article 6.3 ECHR provides for a series of further procedural safeguards. Similarly to article 14 ICCPR, article 6.3 provides for the defendants to enjoy the right to be informed about the reasons of detention and the charges in a language known by them, the right to defence, the right to legal assistance, the right to have an interpreter, and the right to examine and have examined witnesses against them and on their behalf.

More specifically, article 14.2 CRPD provides that

“States Parties shall ensure that if persons with disabilities are deprived of their liberty through any process, they are, on an equal basis with others, entitled to guarantees in accordance with international human rights law and shall be treated in compliance with the objectives and principles of this Convention, including by provision of reasonable accommodation.”

The CRPD Committee has further recommended in its Guidelines on article 14 that:

“all persons with disabilities who have been accused of crimes and [...] detained in jails and institutions without trial be allowed to defend themselves against criminal charges, and be provided with the support and accommodation required to facilitate

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<sup>231</sup> UN Human Rights Committee, General Comment No. 32. Article 14: Right to equality before courts and tribunals and to a fair trial, CCPR/C/GC/32 (2007).

<sup>232</sup> European Convention on Human Rights, accessible [here](#).

their effective participation” as well as procedural accommodations to ensure fair trial and due process.”<sup>233</sup>

The CRPD Committee has established that declarations of unfitness to stand trial or non-responsibility in criminal justice systems and the detention of persons based on those declarations are contrary to article 14 of the CRPD since such declarations “deprive the person of their right to due process and safeguards that are applicable to every defendant.”<sup>234</sup> The Committee has also called for States parties to remove any such declarations from the criminal justice system. The Committee has recommended that “all persons with disabilities who have been accused of crimes and [...] detained in jails and institutions, without trial, are allowed to defend themselves against criminal charges, and are provided with required support and accommodation to facilitate their effective participation”.<sup>235</sup>

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<sup>233</sup> Committee on the Rights of Persons with Disabilities, “Guidelines on the right to liberty and security of persons with disabilities, Article 14: Liberty and security of person”, CRPD/PE/A/72/55 (September 2015), accessible [here](#).

<sup>234</sup> Ibid.233.

<sup>235</sup> Ibid.233.

## **E. Right to an effective remedy and reparation<sup>236</sup>**

The right to an effective remedy for violation of rights is a general principle of law and provided for in every principal human rights treaty. The principle, as expressed in the UN Basic Principles and Guidelines, adopted by consensus of the UN General Assembly, is that:

“The obligation to respect, ensure respect for and implement international human rights law [...] includes [...] the duty to [...] (c) Provide those who claim to be victims of a human rights ...violation with equal and effective access to justice...irrespective of who may ultimately be the bearer of responsibility for the violation; (d) Provide effective remedies to victims, including reparation [...].”<sup>237</sup>

Article 2.3 of the ICCPR provides that States must ensure that any person whose rights or freedoms are violated have access to an effective and enforceable remedy.<sup>238</sup> As affirmed by the Human Rights Committee, this includes provision of reparation that can involve restitution, rehabilitation and measures of satisfaction (e.g., public apologies, public memorials, guarantees of non-repetition and changes in relevant laws and practices.<sup>239</sup>

Article 13 ECHR guarantees the right to an effective remedy as follows:

“Everyone whose rights and freedoms as set forth in the Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.”

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<sup>236</sup> For a fuller treatment of this right under international human rights law, see ICJ (revised) Practitioners Guide number 2, accessible [here: https://www.icj.org/resource/the-right-to-a-remedy-and-reparation-for-gross-human-rights-violations-2018-update-to-practitioners-guide-no-2/](https://www.icj.org/resource/the-right-to-a-remedy-and-reparation-for-gross-human-rights-violations-2018-update-to-practitioners-guide-no-2/)

<sup>237</sup> UN General Assembly, Resolution adopted by the General Assembly on 16 December 2005. Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, A/RES/60/147 (2006), para. 3.

<sup>238</sup> International Covenant on Civil and Political Rights (1966), accessible [here](#).

<sup>239</sup> UN Human Rights Committee, General Comment No. 31. The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, CCPR/C/21/Rev.1/Add. 13 (2004), para. 16.

Article 47 of the EU Charter of Fundamental Rights guarantees the right to an effective remedy for individual rights violations:

“Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article [...] Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice.”

Consistently with these general principles, the CRPD Committee has affirmed that the CRPD requires access to effective remedies and reparation, including restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.<sup>240</sup>

The CRPD Committee has stated that redress is aimed at “restoring the dignity of the victim”, and that restitution aims to “restore the victim to the original situation before the violation occurred.”<sup>241</sup> The CRPD Committee further stated that there is a broader aim for remedies for violations of the rights of persons with disabilities, namely that remedies “should aim at changing attitudes and ensure the possibility of seeking injunctions.”

Moreover, the CRPD Committee has indicated that “(t)he recognition of judicial remedies of a collective nature or class actions can significantly contribute to effectively guaranteeing access to justice in situations that affect groups of persons with disabilities.”<sup>242</sup>

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<sup>240</sup> UN OHCHR, ‘Report - Right to access to justice under article 13 of the Convention on the Rights of Persons with Disabilities’ (December 2017), A/HRC/37/25, paras 47-49.

<sup>241</sup> *Ibid.* 240.

<sup>242</sup> CRPD Committee, General Comment No. 6 (2018) on equality and non-discrimination, CRPD/C/GC/6 (26 April 2018), para. 73(h).

## **International Principles and Guidelines on Access to Justice for Persons with Disabilities<sup>243</sup>**

**Principle 8:** Persons with disabilities have the right to report complaints and initiate legal proceedings concerning human rights violations and crimes, have their complaints investigated and be afforded effective remedies.”

**8.1** States must have accessible, easy-to-use, transparent and effective mechanisms for individuals to report complaints about human rights violations and crimes. Complaint adjudicators and tribunals must provide remedies that are individually tailored and may include redress and reparation.

**8.2** Accordingly, States shall:

Complaint mechanisms

- (a) Establish complaint mechanisms – for instance, national human rights institutions, tribunals and administrative bodies – with the power to hear complaints, including complaints about disability-based discrimination, from persons with disabilities and others and to order remedies;
- (b) Ensure that persons with disabilities may file criminal complaints on an equal basis with others;
- (c) Ensure that civil and criminal complaint mechanisms are accessible, using, for example, hotlines and e-service complaint methods;
- (d) Provide voluntary alternative dispute resolution mechanisms, such as conciliation, mediation, arbitration and restorative justice;
- (e) Ensure that complaint mechanisms and investigations are gender sensitive to guarantee that victims of gender-based violence are able and willing to come forward safely;
- (f) Ensure that special protection units (e.g. those dealing with gender-based violence, hate crime, children and trafficking in persons) are accessible to persons with disabilities and responsive to their needs;

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<sup>243</sup> UN, Special Rapporteur on the Rights of Persons with Disability, International Principles and Guidelines on Access to Justice for Persons with Disabilities (2020).

(g) Ensure that mechanisms, when appropriate and desired, provide for anonymity and confidentiality; (...)

#### Remedies

(a) Ensure, in the criminal context, that those who abuse or otherwise mistreat persons with disabilities are prosecuted and, when appropriate, convicted or subject to other effective sanctions;

(b) Ensure that effective remedies are in place for human rights violations, including the right to be free from disability-based discrimination and the rights to restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition. Such remedies should, among other things:

- (i) Be enforceable, individualized and tailored to meet the needs of claimants;
- (ii) Ensure that victims are protected from repeat violations of their human rights;
- (iii) Be proportional to the gravity of the violations and the circumstances of each case;
- (iv) Be provided on the basis that an individual's free and informed consent is required for any rehabilitative measures;
- (v) Address the systemic nature of human rights violations.

Additionally, according to the OHCHR:

“[r]edress and reparation, in all their components, should be provided, taking into consideration the specific circumstances of the person with disability, addressing systemic change, including the exposure of truth as a component of satisfaction,

and providing guidance for legal and policy reform and capacity building as guarantees of non-repetition.”<sup>244</sup>

This is in line with the jurisprudence of the CRPD Committee in its communications, which typically include recommendations dedicated specifically to ensuring guarantees of non-repetition, including, commonly, recommendations for legal, policy and process reforms and training of duty bearers and state actors (including justice actors). For instance, in its views in the communication *Medina Vela v. Mexico* (No. 32/2015), the Committee observes that “the State party is under an obligation to take measures to prevent similar violations in the future.”<sup>245</sup> *Please see detailed Practical guidance and Recommendations in [section IV](#). below.*

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<sup>244</sup> UN OHCHR, ‘Report - Right to access to justice under article 13 of the Convention on the Rights of Persons with Disabilities’ (December 2017), A/HRC/37/25, para. 65.

<sup>245</sup> In particular, the Committee recommended to “(i)(...) make all necessary amendments to the criminal law (...); (ii) Review the application of security measures involving committal for the purposes of medical and psychiatric treatment and take the necessary steps to promote alternatives (...); (iii) Ensure that persons with intellectual and psychosocial disabilities are provided with appropriate support and reasonable accommodations to enable them to exercise their legal capacity before the courts(...).” Views adopted by the Committee under article 5 of the Optional Protocol concerning communication no 32/2015, 15 October 2019, para. 11 (b).

# 04

**PROCEDURAL RIGHTS OF  
PERSONS WITH  
DISABILITIES AT ALL STAGES  
OF THE ADMINISTRATION  
OF JUSTICE**

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This Chapter elaborates on the specific elements required to guarantee the procedural rights of persons with disabilities.<sup>246</sup>

It focuses on the right to procedural accommodations, the right to interpretation and translation, the right of access to a lawyer, the right to legal aid, accessibility of court facilities, information, and services, and some of the rights and principles that apply specifically in criminal proceedings such as: the right to be present at trial; the presumption of innocence; and rights regarding detention.

### **A. Right to procedural accommodations**

Procedural accommodations are vital in providing for access to justice for persons with disabilities and realising such rights as the rights to legal capacity, participation, information, interpretation, effective assistance of legal counsel and legal aid. It is not possible to outline all possible accommodations for persons with disabilities, as these are case specific and depend on individual situations.

Under article 12(3) UN CRPD national authorities must:

“create an actionable and enforceable right to receive the individually determined procedural accommodations, including support, necessary to enable persons with disabilities to participate effectively in all proceedings in any court, tribunal or forum”.<sup>247</sup>

The CRPD Committee has “consistently indicated that procedural accommodations should be provided on the basis of the ‘free choice and preference’ of the person concerned”.<sup>248</sup> With specific reference to judges, according to the UN OHCHR, “(t)he judge or the responsible entity should give primary consideration to the request of the

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<sup>246</sup> Recommendations in sections IV.1-IV.4 are applicable to all proceedings, not only criminal proceedings

<sup>247</sup> UN Special Rapporteur on the Rights of Persons with Disabilities, International Principles and Guidelines on Access to Justice for Persons with Disabilities (2020), Principle 1, p 15.

<sup>248</sup> UN OHCHR, ‘Report - Right to access to justice under article 13 of the Convention on the Rights of Persons with Disabilities’ (December 2017), A/HRC/37/25, para. 26.

individual with disability, as they know best what their own accommodation needs are”.<sup>249</sup>

In its views in the communication *Medina Vela v. Mexico* (No. 32/2015),<sup>250</sup> the Committee found a violation of article 13 of the CRPD (effective access to justice on an equal basis with others) due to Mexico’s failure to make provision for procedural accommodations. The State in this case had denied the applicant the possibility of exercising their right to access justice by failing to ensure their opportunity to participate in the judicial proceedings. The applicant was not permitted to testify, test evidence or attend hearings pertaining to his own case. Nor was the applicant notified of the decisions taken in his matter. The application for the special procedure in this case did not guarantee that procedural accommodations would be made to enable the applicant to access justice on an equal basis with others.

The CRPD Committee has also addressed the importance of granting procedural accommodations in its views in the communication *Gemma Beasley v. Australia* No. 11/2013.<sup>251</sup> The applicant in that case was deaf and was summoned to be a juror in criminal jurisdiction. However, she was denied the assistance of a sign-language interpreter or other procedural accommodation that would allow her to exercise her role.<sup>252</sup> In its recommendations, the Committee recalled the State’s duty to ensure reasonable and procedural accommodations to enable her full participation.<sup>253</sup>

## **International Principles and Guidelines on Access to Justice for Persons with Disabilities**

### **Principle 3**

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<sup>249</sup> Ibid. 248.

<sup>250</sup> Views adopted by the Committee under article 5 of the Optional Protocol concerning communication no 32/2015, 15 October 2019, para. 10.7

<sup>251</sup> CRPD Committee, Views adopted by the Committee under article 5 of the Optional Protocol, concerning communication No. 11/2013, UN Doc. CRPD/C/15/D/11/2013 (2016).

<sup>252</sup> Ibid. para. 1-2.3.

<sup>253</sup> Ibid. para. 9.

“Persons with disabilities, including children with disabilities, have the right to appropriate procedural accommodations.”<sup>254</sup>

According to Principle 3.1:

“To avoid discrimination and guarantee the effective and equal participation of persons with disabilities in all legal proceedings, States shall provide gender and age-appropriate individualized procedural accommodations for persons with disabilities.”

Moreover, the International Principles clarify that these procedural accommodations “encompass all the necessary and appropriate modifications and adjustments needed in a particular case, including intermediaries or facilitators, procedural adjustments and modifications, adjustments to the environment and communication support, to ensure access to justice for persons with disabilities. [...]” Finally, Principle 3.1 states that “To the fullest extent possible, accommodations should be organized before the commencement of proceedings.”<sup>255</sup>

Regarding police officers, prosecutors and others involved in arrests and investigations of criminal offences, Principle 3.2 (h) requires States to ensure that these professionals are “knowledgeable about the rights of persons with disabilities, are alert to the possibility that a person may have a disability and, throughout the course of an arrest or investigation, adjust their responses accordingly.”<sup>256</sup>

States shall also ensure that

“[...] independent third persons, such as attorneys or others, are available to accompany persons with disabilities to the police station to assist them in the investigative process, including, for example, fingerprinting or giving a biological sample [...]”<sup>257</sup>

Finally, States shall ensure that “[...] all participants in legal proceedings must be advised of the availability of procedural accommodations if needed and desired because of disability.”<sup>258</sup>

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<sup>254</sup> UN, Special Rapporteur on the Rights of Persons with Disabilities, International Principles and Guidelines on Access to Justice for Persons with Disabilities (2020), Principle 3, p 15.

<sup>255</sup> Ibid. 254.

<sup>256</sup> UN, Special Rapporteur on the Rights of Persons with Disability, International Principles and Guidelines on Access to Justice for Persons with Disabilities (2020), Principle 3.2 (h), p. 17.

<sup>257</sup> Ibid. 256. Guideline 3.2(i).

<sup>258</sup> Ibid. 256. Guideline 3.2 (l).

It is also important to note that if procedural accommodations for a person with a disability are not made during police interrogations, such interrogations might be declared unlawful and the results inadmissible by the courts, which might impede the justice process. It is also important to ensure all procedural accommodations are gender-sensitive and appropriate.<sup>259</sup>

### **Request for and offers of accommodations**

According to the International Principles, States should enact legislation and produce regulations, policies, and guidelines so as to enable “persons with disabilities to request procedural accommodations, including modifications of or support in legal processes, with appropriate protection of their privacy.”<sup>260</sup> Throughout the course of legal proceedings, participants must be “advised of the availability of procedural accommodations if needed and desired because of disability.”<sup>261</sup>

As stated by the CRPD Committee, in its General Comment No. 6:

“(t)he duty to provide reasonable accommodation is an individualized reactive duty that is applicable from the moment a request for accommodation is received. Reasonable accommodation requires the duty bearer to enter into dialogue with the individual with a disability.”<sup>262</sup>

In addition to the reactive obligation, the duty to provide reasonable accommodations includes a proactive obligation on justice actors to anticipate needs and provide accommodations even in the absence of a request.

As the CRPD Committee has explained:

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<sup>259</sup> For more details on gender-appropriate procedural accommodations, please see: Validity Foundation, [Fair Trial Denied: Defendants with Disabilities Face Inaccessible Justice in the EU](#), 2024, p. 71ss.

<sup>260</sup> Ibid. 256. Guideline 3.2(k).

<sup>261</sup> Ibid. 256. Guideline 3.2(l).

<sup>262</sup> CRPD Committee, General Comment No. 6, para. 24(b), accessible here: <https://www.ohchr.org/en/documents/general-comments-and-recommendations/general-comment-no6-equality-and-non-discrimination>

“it is important to note that the duty to provide reasonable accommodation is not limited to situations in which the person with a disability has asked for an accommodation or in which it could be proved that the alleged duty bearer was actually aware that the person in question had a disability. It should also apply in situations where a potential duty bearer should have realized that the person in question had a disability that might require accommodations to address barriers to exercising rights.”<sup>263</sup>

The UN International Principles provide that States should guarantee the availability of procedural accommodations to give people with disabilities the possibility to choose how to defend themselves.<sup>264</sup> The CRPD Committee has explained the main difference between “procedural accommodations” and “reasonable accommodations.” While “reasonable accommodations” are limited by the concept of disproportionality, procedural accommodations do not present this limit.<sup>265</sup> The UN International Principles also underline that States should guarantee healthcare and psychological support on request of persons with disabilities and on the basis of their free and informed consent.<sup>266</sup>

States must therefore provide for the possibility for all persons with disabilities to have access to such procedural accommodations they may need to participate fully in justice processes. This duty to determine which accommodations are needed and make them available exists even where the person in question does not request such accommodations. The Committee describes leaving the responsibility of requesting accommodations on persons with disabilities alone as placing a “disproportionate or undue burden” on such already marginalized individuals.<sup>267</sup>

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<sup>263</sup> Ibid. para. 24(b)

<sup>264</sup> UN, Special Rapporteur on the Rights of Persons with Disability, International Principles and Guidelines on Access to Justice for Persons with Disabilities, Guideline 5.2 (f), p. 19.

<sup>265</sup> CRPD Committee, General Comment No. 6, para. 25 d.

<sup>266</sup> Ibid. 263. Guideline 5.2 (g).

<sup>267</sup> CRPD Committee, General Comment No. 6, para. 25(b).

A person with a disability may elect to decline the provision of some accommodations suggested or provided by the State. States nevertheless are required to offer and make available accommodations – determined in consultation with the person with a disability themselves.

Persons with disabilities are not often believed or taken seriously when they disclose their disabilities and needs. Justice actors should assume, in good faith, that an individual's disclosure of a disability and their requests for accommodations are accurate and necessary, unless it is established in clear terms and on an objective basis that they are not.

### Good Practice

In Spain, procedural accommodations can be requested by any of the parties, the public prosecutor, the judge or the person with a disability themselves.<sup>268</sup> The police can also request them since the first interactions with a person with a disability.<sup>269</sup>

### *Practical guidance and recommendations*

1. **A defendant's right to a fair trial and due process in the administration of justice, on an equal basis**, with others must be respected from the first contact with law enforcement officers and throughout all processes, *including* through access to **procedural accommodations**.
  - A. **Responsible justice** actors must ensure that **procedural accommodations** are available for persons with disabilities to allow for their participation in each procedure, from the first contact with law enforcement authorities and through all processes.
  - B. All procedural accommodations should be **gender- and age-appropriate**.

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<sup>268</sup> Plena Inclusión, [Briefing paper on barriers faced by defendants with intellectual and/or psychosocial disabilities in the Criminal Justice System in Spain](#), Madrid, ENABLE Project, 2023, p. 33.

<sup>269</sup> *Ibid.* 267. p. 32.

- C. Persons with disabilities should **participate in the process of the identification and determination of their disabilities**. Where there is an *indicia* that an individual may have a disability there is an obligation on the authorities to make a full determination, taking into account the individual's views.
  - D. **Adequate support services** should be made available within the criminal justice system to ensure the provision of procedural accommodations for persons with disabilities.
    - i. **Where identification of needs for procedural accommodations needs to be in place, it must be done at the beginning of the proceedings, at the earliest stage.**
    - ii. **Preparations** for procedural accommodations and other adjustments in the hearing must be made prior to the police or other official interview, or prior to the hearing/trial.
2. All participants, including defendants with disabilities, should **be informed about their rights and the availability of procedural accommodations** throughout the course of the proceedings.
- A. Authorities must ensure that defendants **are made aware of the possibility** of having procedural accommodations throughout the proceedings and know that **they can request them at any time**.
  - B. It should **not be the sole responsibility** of the defendant to request the accommodations. Responsible justice actors have a proactive duty to initiate the provision of accommodations.
3. Justice actors and national authorities should **consult closely with and actively involve persons with disabilities** and their representative organizations in all discussions and decision-making regarding procedural accommodations.
4. **Responsible actors should cooperate** to establish a uniform and effective framework for providing appropriate procedural accommodations for

defendants with disabilities. Effective coordination is necessary at central and local levels.

### *Systemic recommendations*

1. Judiciaries should develop and adopt regulations and standards that recognize and enforce the right to receive procedural, age and gender-appropriate accommodations, including support, necessary to enable defendants with disabilities to exercise their legal capacity, and participate effectively in any applicable judicial or administrative proceedings.<sup>270</sup>
2. **A comprehensive procedure for recognizing, requesting, assessing, and providing** individual support for persons with disabilities should be developed and implemented.
3. Clear and **effective procedures relating to the provision of procedural accommodations** must be developed and implemented by justice actors whenever a person with a disability, and in particular a person with intellectual and/or psychosocial disabilities, interacts with the criminal justice system.
  - A. **A guide or manual on procedural accommodations for the administration of justice** should be produced and widely disseminated to facilitate the correct approach by justice actors concerning persons with disabilities.

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<sup>270</sup> These include adaptation of the venue; appropriate waiting spaces; removal of cloaks and wigs; adjustments to the pace of proceedings; separate building entrances and waiting rooms and protective screens to separate persons with disabilities from others if necessary due to physical or emotional distress; modifications to the method of questioning in appropriate circumstances, such as allowing leading questions, avoiding compound questions, finding alternatives to complex hypothetical questions, providing extra time to answer, permitting breaks as needed and using plain language; and use of pre-trial video recording of evidence and testimony, if necessary, practical and possible, in such a manner as not to contravene basic rights, such as the right to confront and cross-examine witnesses.

## **Process for individual assessment for adaptation of procedural accommodations**

### *International Human Rights Law and EU Law and Standards*

In addition to seeking input from the person about their accommodation needs, an individual assessment is a necessary process to ensure the full and proper participation of persons with disabilities in criminal proceedings. Such individual assessments should be used to:

“identify the particular barriers that a person with disability experiences (...) and their specific support needs. It determines how to remove or overcome the barriers, what support and procedural accommodations are necessary, and how to provide these. Ideally, it should take place from the first contact with the relevant authorities in the administration of justice.”<sup>271</sup>

In EU law, the Recommendation on vulnerable persons, stress the importance of recognizing and identifying situations of vulnerability.<sup>272</sup> The Recommendations prescribe that:

“an initial assessment should be carried out by police officers, law enforcement or judicial authorities. The competent authorities should also be able to ask an independent expert to examine the degree of vulnerability, the needs of the vulnerable person and the appropriateness of any measures taken or envisaged against the vulnerable person.<sup>273</sup> The persons concerned (suspects or accused) should have the right to challenge such assessment.”<sup>274</sup>

### **Individual assessment for children with disabilities**

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<sup>271</sup> Validity Foundation, Voices for justice, Toolchest for professionals, p.22, see: <https://validity.ngo/wp-content/uploads/2023/01/Voices-for-Justice-TOOLCHEST-for-professionals-EN.pdf>.

<sup>272</sup> Recital 6, Commission Recommendation 2013/C-378/02 on procedural safeguards for vulnerable persons suspected or accused in criminal proceedings.

<sup>273</sup> Ibid.271.

<sup>274</sup> Ibid. Recital 7.

Similar individual assessments are provided for in EU law. For example, such assessments are required by article 7 of Directive (EU) 2016/800 on procedural safeguards for children who are suspects or accused persons in criminal proceedings.

The Directive acknowledges the “right to individual assessment” as one of the elements of the rights of children in conflict with the law. Under article 7(4) of the Directive, such an individual assessment serves the purpose of determining whether any specific measures to the benefit of the child are to be taken; assessing the appropriateness and effectiveness of any preliminary measures; and assisting in taking any decisions in criminal proceedings, including sentencing. The assessment can thus be used to determine if, and to what extent, a child needs procedural accommodations during the criminal proceedings, the extent of their criminal responsibility and the appropriateness of a particular penalty or educative measure.<sup>275</sup>

A similar type of assessment, tailored to the specific context needs of persons with disabilities, is a crucial pre-requisite for the effective adaptation of proceedings for the person concerned, and should be implemented for persons with disabilities.

Responsibility for such individual assessments typically lies with those criminal justice actors and authorities whose responsibility is engaged at different phases of criminal proceedings, from police to prosecuting authorities and legal to the judicial officers. However, in practice, the individual assessment process can be initiated, implemented and coordinated through support services, social workers, law enforcement, court officials, court-appointed experts, and other responsible professionals. A particular type of qualified institution or professional can be mandated by law or court order to systematically conduct and update the individual assessment in criminal proceedings.<sup>276</sup> Overall, justice actors should take responsibility for ensuring that such assessments have occurred and such assessments have led to measures necessary

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<sup>275</sup> ICJ, Recommendations on the main principles governing the individual assessment of children in conflict with the law, see: <https://icj2.wpenginepowered.com/wp-content/uploads/2021/12/ENGL-Recommendations-Individual-assessment.pdf>.

<sup>276</sup> Validity Foundation, [Toolchest Voices for Justice: Communicating with victims of crime with disabilities](#), Voices for justice project, p.24.

for the enjoyment of the right to a fair hearing or trial persons with disabilities in accordance with the IHRL, including the CRPD, the ICCPR, and the ECHR.

According to a Validity toolchest<sup>277</sup> on persons with disabilities, an individual assessment should:

- Be conducted in a systematic way from first contact with the justice system. The information can be shared in a way that does not compromise the confidentiality of the individual and ensures that their needs are understood and met;
- Respect the legal capacity of the person, and their will and preference;
- Involve a multidisciplinary approach and team to include the correct people and expertise in the process. For people with disabilities, this may include, as examples, a support person, a social worker, a communications expert, a lawyer;
- Set out clearly the barriers that the person with a disability faces, and what support and procedural accommodations are necessary to overcome these barriers, including where responsibility lies for provision, and how these will be provided in practice;
- Take place continuously, so that needs and barriers can be identified and addressed at all stages of the process; and
- Identify a particular contact person to whom the person with a disability can always go with requests for additional or different forms of support and procedural accommodations.

Some difficulties might arise in relation to sharing the individual assessment among the professionals, especially through digital tools. The process by which individual assessments are conducted and information about them stored and distributed must clearly set out guidelines and standards to ensure respect for the right to privacy of an individual with a disability. In this context, the EU Directive 2016/680<sup>278</sup> gives important

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<sup>277</sup> Ibid. 276.

<sup>278</sup> ICJ, Recommendations on the main principles governing the individual assessment of children in conflict with the law, see: <https://icj2.wpenginepowered.com/wp-content/uploads/2021/12/ENGL-Recommendations-Individual-assessment.pdf>

indications on how the data must be stored and distributed. In particular, article 4(f) of the Directive requires data to be:

“processed in a manner that ensures appropriate security of the personal data, including protection against unauthorized or unlawful processing and against accidental loss, destruction or damage, using appropriate technical or organizational measures.”<sup>279</sup>

### *Challenges*

The quality of information available to the competent authorities, including justice actors, necessarily determines the effectiveness of accommodations they may be able to devise and provide, taking into account the will, preferences and needs expressed by a person with a disability. This information should be gathered as soon as possible, before questioning is organized, through a preliminary assessment with this goal in mind.

In practice, information about disability may be difficult to obtain for a variety of reasons. A defendant may be uncomfortable or afraid to disclose their disability due to stigma or mistrust of criminal justice authorities based on their perceptions and/or experiences. This may be felt even more strongly, for example, by female defendants due to social stigma associated with multiple forms of discrimination on the basis of both gender and disability individually and simultaneously. A defendant may also be unaware of their own disability or the impact it may have on their ability to participate effectively in justice processes and procedures. Moreover, the accelerated nature of some criminal justice proceedings may make conducting an assessment by a competent professional, prior to the first questioning, practically difficult and seemingly cumbersome for court processes and at localized levels.

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<sup>279</sup> EU Parliament and Council, Directive (EU) 2016/680 on the protection of natural persons with regard to the processing of personal data by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and on the free movement of such data, and repealing Council Framework Decision 2008/977/JHA (2016).

In practice, disability-rights organizations have reported that there is sometimes no set methodology for identifying disability in criminal justice systems. In Bulgaria, for example, justice actors who are not provided with medical documentation and who do not receive any systematic or mandatory training in this respect, must rely on their personal sensitivity and knowledge to determine whether an individual has a disability and whether this has any bearing on their ability to participate in justice processes and procedures. If justice actors believe there is something "wrong" with the way a person communicates or behaves, and they suspect that there is sufficient evidence for the commission of a crime that has been alleged, they will typically file a request for forensic expertise in relation to an individual's disability. A psychiatrist and a psychologist then conduct an examination, which is designed to determine the person's sanity/competency to stand trial. Some interviewees reported experiencing such evaluations as being biased towards certain outcomes, diagnosis-centered and prejudiced against them as persons with disabilities. They also reported that the conclusions of such "expert evaluations" are frequently accepted by justice actors without further consideration and then dominate the entire justice process.<sup>280</sup>

One promising practice has been identified in Bulgaria, namely the conduct of an assessment by a qualified NGO of the social functioning of an individual with a disability.<sup>281</sup> Such an assessment may help to provide information to a court on the person's social functioning and communication needs, which can assist in enabling the provision of support **for an individual's effective participation in a trial**. However, the practice is relatively new and has only covered a small number of cases thus far.<sup>282</sup> In

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<sup>280</sup> Kera Foundation, [Briefing paper on barriers faced by defendants with intellectual and/or psychosocial disabilities in the Criminal Justice System in Bulgaria](#), Veliko Tarnovo, ENABLE Project, 2023, p. 24.

<sup>281</sup> An NGO, Global Initiative in Psychiatry – Bulgaria, created this instrument and is currently piloting it. They offer a team of social workers and psychologists and these are usually the main experts making the assessment. The assessment was piloted to improve access to justice for persons with disabilities in three particular types of court cases: placements in group homes, placements under guardianship, and forced hospitalizations. Currently, they are trying to promote this model for all types of cases concerning persons with disabilities.

<sup>282</sup> Kera, p. 31, A video explaining the aim of the assessment and how it can be used, available at: <https://www.youtube.com/watch?v=jtQUPc9uUj8>. So far, this instrument is used mostly in civil law cases.

addition, it relies on the continued operation and resourcing of NGOs, instead of such resources coming from within the justice system itself.

In Spain, interviewees reported that in many cases the individual's disabilities are only discovered after a trial. Therefore, even where there may have been a need for an intermediary to assist in some proceedings, they are not used, despite the fact that Spanish law allows for the participation of such an intermediary.<sup>283</sup>

In Lithuania,<sup>284</sup> interviewees reported that there is a lack of experience within the judiciary as a whole, as well as on the part of justice actors, such as lawyers and prosecutors, in assessing the "vulnerability" of defendants with disabilities.

In Slovenia, interviewees described the systemic failure of authorities to identify disability from the very first contact with the authorities. There is no unified system in place which would enable authorities to carefully and accurately evaluate individuals to determine whether they are persons with disabilities, the nature of which would require procedural accommodations to be provided.<sup>285</sup>

### *Practical guidance and recommendations*

1. **A practical mechanism to identify disability early in legal processes through an individual assessment** should be developed and implemented, so that all necessary measures are taken to ensure that the person with a disability will go through the entire criminal justice process on an equal basis.
  - A. identification, for example through an individual assessment, should occur early in the criminal justice process **at the very beginning of the proceedings, and prior to any actions undertaken** as part of the criminal justice proceedings, for instance prior to a police interview.
  - B. The police, other law enforcement authorities and any other justice actor or individual involved in the identification of **disability must - after**

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<sup>283</sup>Plena Inclusión, [Briefing paper on barriers faced by defendants with intellectual and/or psychosocial disabilities in the Criminal Justice System in Spain](#), Madrid, ENABLE Project, 2023, p.29.

<sup>284</sup>Mental Health Perspective, [Briefing paper on barriers faced by defendants with intellectual and/or psychosocial disabilities in the Criminal Justice System in Lithuania](#), Vilnius, ENABLE Project, April 2023, p.16.

<sup>285</sup> PIC, [Briefing paper on barriers faced by defendants with intellectual and/or psychosocial disabilities in the Criminal Justice System in Slovenia](#), Ljubljana, ENABLE Project, 2023, p.54-55

identifying the individual has a disability - ensure the provision of assistance, accommodations and support from the early stages of the proceedings.

- C. Justice actors and other individuals involved in the identification of disabilities during criminal justice processes should be **adequately trained on the nature and definition of disability and the purpose of the identification of an individual's disability; the legal rights of persons with disabilities; and the duty to provide procedural accommodations to persons with disabilities.**

### **Promising practice**

In some, countries, such as the UK and Spain, this assessment can be done by intermediaries. In Spain, intermediaries can be provided freely by NGOs like Plena Inclusion.<sup>286</sup> When prison officers suspect that a person has an intellectual disability, they contact Plena Inclusion that conducts an assessment and provides assistance in obtaining official recognition.<sup>287</sup>

- D. The primary purpose of the identification of a disability should be to obtain the information required for the competent authority to determine and decide - in consultation with the person with a disability - **the provision of procedural accommodations.** This process should never be used as a means of diminishing participation of an individual or excluding participation entirely.

2. Judges and other justice actors should - at later stages in the legal process - **verify that the individual assessments have been completed** early in the process prior to the matter appearing before them.

3. Defendants so assessed should be informed about the details of the individual assessment, **be involved in its development,** and should receive it when finalized.

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<sup>286</sup>Plena Inclusión, [Briefing paper on barriers faced by defendants with intellectual and/or psychosocial disabilities in the Criminal Justice System in Spain](#), Madrid, ENABLE Project, 2023, p. 20.

<sup>287</sup> Ibid. 285.p. 30.

They should have the right to comment on such an assessment and, if necessary, contest it.

### *Systemic recommendations*

- 1. Responsible authorities should identify and disseminate best practices** regarding the identification of disability and develop and implement trainings focusing on the human rights model of disability and the procedural accommodations which should be made so that persons with disabilities can participate on an equal basis in all legal processes.<sup>288</sup>

#### **Promising practice**

In Bulgaria, the courts use an “NGO assessment of the social functioning of persons with disabilities and their special needs.”<sup>289</sup> This assessment is designed to be used in all courts addressing cases with persons with disabilities. It aims to increase effective participation in the trial and to improve the protection of the person’s rights and interests.<sup>290</sup>

- 2. Information sharing rules and safeguards** should be in place when an individual assessment is being conducted by justice actors.

## **Independent intermediaries**

### *International Human Rights Law*

Intermediaries (also sometimes referred to as “facilitators”) are persons who work, as required, with justice system personnel and persons with disabilities to ensure effective communication by and with a person with a disability during legal proceedings. Some persons performing similar roles are referred to as Communication Assistants (Australia) or Communication Support Specialists (US).<sup>291</sup>

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<sup>288</sup> FENACERCI, [Briefing paper on barriers faced by defendants with intellectual and/or psychosocial disabilities in the Criminal Justice System in Portugal](#), Lisbon, ENABLE Project, 2023, p. 61.

<sup>289</sup> KERA Foundation, [Briefing paper on barriers faced by defendants with intellectual and/or psychosocial disabilities in the Criminal Justice System in Bulgaria](#), Veliko Tarnovo, ENABLE Project, 2023, p. 31.

<sup>290</sup> Ibid. 288.p. 60.

<sup>291</sup> JISK – Module 2 defining the justice intermediary, p.3, See: <https://justiceintermediary.org/modules/>

Intermediaries are typically appointed and employed by the court<sup>292</sup> and their aim is to facilitate communication between an individual with a disability and justice actors in legal processes. They are not support persons *per se*, but rather serve as a conduit to facilitate effective communication, to ensure that a defendant or accused person understands questions and can be understood by justice actors and other participants in legal processes. The intermediary also takes time to understand the communication needs of the defendant/accused and should be involved in a case at the earliest point possible, ideally at the point at which the accused is interviewed by the police. Through intermediaries, persons with disabilities can be supported in making informed choices and communicating them clearly. This is done in different ways depending on the individual's particular disability, but always by making sure that information is explained and talked about in ways that the individual understands. Intermediaries also have a key role to play in recommending appropriate procedural accommodations and supports, which may be provided to assist in an individual's effective participation in legal processes.<sup>293</sup> The role of an intermediary may vary across various jurisdictions.

### **International Principles and Guidelines on Access to Justice for Persons with Disabilities**

Principle 1, Guideline 1.2.j enjoins States to:

“provide intermediaries or facilitators, wherever and whenever needed, to enable clear communication among and between persons with disabilities and courts, tribunals and law enforcement agencies to ensure safe, fair and effective engagement and the opportunity to fully participate in legal processes.”<sup>294</sup>

Intermediaries or facilitators, must be available to facilitate communication between persons with disabilities and law enforcement and court personnel.<sup>295</sup>

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<sup>292</sup> For instance, in the United Kingdom, the Criminal Procedure (Amendment) Rules 2021, Article 18.27 clarifies that intermediaries are appointed by the Court.

<sup>293</sup> *Ibid.* 290.

<sup>294</sup> UN, Special Rapporteur on the Rights of Persons with Disability, *International Principles and Guidelines on Access to Justice for Persons with Disabilities* (2020), p. 13.

<sup>295</sup> *Ibid.* 293.

According to the International Principles, “[i]ntermediaries are neutral and they do not speak for persons with disabilities or for the justice system, nor do they lead or influence decisions or outcomes.”<sup>296</sup>

Intermediaries or facilitators provide support for persons with disabilities in order for them to enjoy legal capacity on an equal basis with others.<sup>297</sup>

Independent intermediaries or facilitators trained to provide communication assistance to parties to the proceedings and the justice system should be available in every justice system.<sup>298</sup>

Intermediaries should be best considered as officers of the court and be responsible to the court or justice system more broadly.

An appellate court in England described how an intermediary assisted a defendant with intellectual and communication disability in a criminal case in the following way:

[The intermediary] “maintained a visual record to enable the [defendant] to follow the evidence; she wrote simple sentences for him; and she held twice daily meetings with [him] outside court to summarise past and future events in the trial; she assisted him with a vocabulary folder to explain more difficult concepts; and she was eventually able to explain satisfactorily to him what the role of the jury was.”<sup>299</sup>

### *Challenges*

In a number of EU Member States, intermediaries for defendants with disabilities in criminal proceedings are not regulated by law at all.<sup>300</sup> Access to intermediaries is also often difficult. Even in States where the use of intermediaries is provided for in law,

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<sup>296</sup> International Principles and Guidelines on Access to Justice for Persons with Disabilities (2020), p. 10.

<sup>297</sup> International Principles and Guidelines on Access to Justice for Persons with Disabilities (2020), p. 15.

<sup>298</sup> Ibid. 296.

<sup>299</sup> R. v. Dixon, [2013] EWCA Crim. 465<sup>8</sup> available at <https://www.bailii.org/ew/cases/EWCA/Crim/2013/465.html> in: Implementing the Convention on the Rights of persons with disabilities in criminal justice systems, A briefing paper, July 2022.

<sup>300</sup> See for instance bulgari

p.13; PIC, [Briefing paper on barriers faced by defendants with intellectual and/or psychosocial disabilities in the Criminal Justice System in Slovenia](#), Ljubljana, ENABLE Project, 2023, p.56; FENACERCI, [Briefing paper on barriers faced by defendants with intellectual and/or psychosocial disabilities in the Criminal Justice System in Portugal](#), Lisbon, ENABLE Project, April 2023, p.39); FORUM, [Briefing paper on barriers faced by defendants with intellectual and/or psychosocial disabilities in the Criminal Justice System in Slovakia](#), Praha, ENABLE project, 2023 p.16).

there may be no clear indications on other practical elements to organize and allow their work.

In Romania, intermediaries are not regulated by law, but in practice, criminal justice actors sometimes seek the assistance of “informal intermediaries/support persons” when they see fit (these are sometimes referred to as “intermediaries” but are not regulated as such).<sup>301</sup> There are instances when the court may order the presence at a hearing of a psychologist,<sup>302</sup> or, when dealing with a victim of a crime, also a specialist in victim counselling, but only specifically for a victim of a crime<sup>303</sup> or a minor<sup>304</sup> whenever they are a victim or a witness.<sup>305</sup> No such provision is made for a criminal accused or other participants in justice processes. The CRPD, however, requires provision for support for persons with disabilities should be provided to all participants, in all justice processes and procedures, irrespective of the nature of the participation by the individual with a disability.<sup>306</sup>

In Spain,<sup>307</sup> the Civil Procedure Act and the Voluntary Jurisdiction Act expressly provide for accommodations for persons with disabilities and allow for an “expert professional to act as an intermediary to provide the necessary adaptations and accommodations to enable the person with a disability to understand and be understood.”<sup>308</sup> While this role is recognized by law, it has not been further regulated and supplemented by administrative regulations, guidelines and policies. This means that it is not specified by law who can perform this function, what qualifications, expertise and experience are

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<sup>301</sup> Centre for Legal Resources, [Briefing paper on barriers faced by defendants with intellectual and/or psychosocial disabilities in the Criminal Justice System in Romania](#), Bucarest, ENABLE Project, 2023, p.12.

<sup>302</sup> In the provisions of the Romanian Criminal Code only the psychologist and the specialist in victim counselling are specified to be present at a hearing in cases with victims of crimes (adult or underage). And in the case of underage witnesses the provisions specify only the presence of a psychologist in a hearing. Project partners do not have any data regarding initial training or continuous training for psychologists in these cases.

<sup>303</sup> Article 111 (6) (b) Criminal code; Centre for Legal Resources (CLR), [Briefing paper on barriers faced by defendants with intellectual and/or psychosocial disabilities in the Criminal Justice System in Romania](#), Bucarest, ENABLE Project, 2023, p.12.

<sup>304</sup> Ibid. 302.

<sup>305</sup> Ibid. 302.

<sup>306</sup> Ibid. 302. p.23.

<sup>307</sup> FENACERCI, [Briefing paper on barriers faced by defendants with intellectual and/or psychosocial disabilities in the Criminal Justice System in Portugal](#), Lisbon, ENABLE Project, 2023, p.21.

<sup>308</sup> Ibid. 306.

required to do so, or how such positions are to be financed or by whom. According to Plena Inclusión, the author of the national study in the Enable project, at present, there are persons who act as intermediaries in judicial proceedings, but they belong to NGOs that work in this field and provide the service.<sup>309</sup> According to the national study, in most cases, disabilities had only been discovered after the trial, and therefore there are typically no intermediaries involved in the proceedings, although Spanish law permits their involvement.<sup>310</sup>

In Lithuania, no formal provisions regarding procedural accommodations exist within the criminal justice system. In practice, procedural measures are left to the discretion of judges, prosecutors, and other criminal justice professionals. In one case, according to the national study, an intermediary was present, and immediately ensured more secure and calm proceedings for the defendant.<sup>311</sup>

#### *Practical guidance and recommendations*

1. **Where needed, an intermediary should be called to assist in communication during police interviews with the person with a disability suspected of the crime.**
2. **As a form of procedural accommodation, intermediaries should be provided to defendants with disabilities wherever and whenever needed,** to enable clear communication between them, the police, and justice actors, including the courts, to ensure safe, fair and effective engagement, and to provide the opportunity to fully participate in all stages of proceedings. This requires that:
  - A. **A sufficient number of trained intermediaries be made available for persons with disabilities from the start of the proceedings, and at all stages of the administration of justice.**

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<sup>309</sup> Ibid. 306. p. 22.

<sup>310</sup> Plena Inclusión, [Briefing paper on barriers faced by defendants with intellectual and/or psychosocial disabilities in the Criminal Justice System in Spain](#), Madrid, ENABLE Project, 2023, p.29.

<sup>311</sup> Mental Health Perspective, [Briefing paper on barriers faced by defendants with intellectual and/or psychosocial disabilities in the Criminal Justice System in Lithuania](#), Vilnius, ENABLE Project, 2023, p. 13.

- B. Systematic training on the role of intermediaries are in place.
- C. The use of intermediaries do not generate costs for persons with disabilities.
- D. In the absence of sufficient and qualified court-appointed intermediaries, courts work collaboratively with stakeholders who provide such support to persons with disabilities.

### *Systemic recommendations*

1. In the long-term, procedural accommodations – including the possibility of an intermediary– should be included in national legislation and rules applicable to the Courts to ensure the full implementation of the CRPD in the justice systems.
2. National law should include the regulation on the position of intermediaries, which should include who can be an intermediary, what conditions need to be fulfilled, a code of ethics, and the need to remain independent part in the process.
3. Even where NGOs provide the resources to ensure intermediaries/ in the proceedings, the State has the obligation to provide necessary financial, material and human resources (for intermediaries) and should give practical effect to this responsibility.

### **Right to be accompanied by a support person, which may include a relative**

#### *International Human Rights Law*

The right to be accompanied by a support person, including a relative or other trusted person, while not expressly provided for under the CRPD, is an essential component of a set of measures to ensure equal access to justice for persons with disabilities. In particular, article 12(3) of the CRPD requires States to provide access by persons with disabilities to the support they may require to exercise their legal capacity. The CRPD

Committee has interpreted the term “support” in article 12 as sufficiently broad to include the possibility of persons with disabilities being entitled to choose one or more trusted persons to assist them in exercising their legal capacity.<sup>312</sup>

The third principle of the UN International Principles explicitly refers to the obligation of States to guarantee the right to be accompanied.

### **International Principles and Guidelines on Access to Justice for Persons with Disabilities**

“(d) Allowing persons with disabilities, at all stages of the process if they so choose, to be accompanied by family, friends or others to provide emotional and moral support, without replacing, however, the role of an intermediary or facilitator.”

These support persons may play a critical and specific role that differs from that of the intermediaries. As explained in the previous section ([section IV.1.3](#)), intermediaries may have different functions, but in general, offer practical support to facilitate communication and to provide adequate accommodations. Families, friends, and other trusted persons can offer moral and emotional support.<sup>313</sup>

### *Challenges*

In many countries, the right to be accompanied by family, friends or other trusted persons is not provided for in law or implemented in practice. For instance, in Romania, there is a complete lack of provision for individuals with disabilities to be accompanied by family, friends or other trusted persons who may be able to provide them with emotional and moral support during the proceedings.<sup>314</sup>

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<sup>312</sup> CRPD Committee, General Comment No.1 para 17.

<sup>313</sup> UN, Special Rapporteur on the Rights of Persons with Disability, International Principles and Guidelines on Access to Justice for Persons with Disabilities, Principle 3.2.d, p 16.

<sup>314</sup> Centre for Legal Resources (CLR), [Briefing paper on barriers faced by defendants with intellectual and/or psychosocial disabilities in the Criminal Justice System in Romania](#), Bucarest, ENABLE Project, 2023, p.23.

Spain's civil procedure legislation provides that "persons with disabilities (have) the right to be accompanied by a person of their choice from the first contact with authorities."<sup>315</sup> In practice, however, defendants with disabilities are usually allowed to call a person of trust, as well as their family, but mostly only through telephonic contact, while no face-to-face contact is permitted. During the trial, in some cases, family has not been permitted to attend proceedings.<sup>316</sup>

In Lithuania, a prosecutor's decision or a court order is required to allow a person to participate in the process with the right to a representative. This may include a family member or a close relative, who has submitted a written or verbal request to participate in this manner. Such person may act as a representative for a person who is not necessarily recognized as incapacitated by the court, but who, due to their old age, disability, illness or other important reasons, is considered to not be capable of properly exercising their rights.<sup>317</sup> This seems to be *de facto* substituted decision making without a requirement for informed consent.

In Slovakia, the conducting of investigative procedures and hearings in the presence of a "confidant" is allowed in all procedures in criminal proceedings for the aggrieved parties.<sup>318</sup>

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<sup>315</sup> Act 8/2021, of 2 June, reforming civil and procedural legislation for supporting people with disabilities in the exercise of their legal capacity (BOE no. 132, 3 June 2021).

<sup>316</sup> Plena Inclusión, [Briefing paper on barriers faced by defendants with intellectual and/or psychosocial disabilities in the Criminal Justice System in Spain](#), Madrid, ENABLE Project, 2023, p.29.

<sup>317</sup> Mental Health Perspectives, [Briefing paper on barriers faced by defendants with intellectual and/or psychosocial disabilities in the Criminal Justice System in Lithuania](#), Vilnius, ENABLE Project, April 2023, p.9; Lithuanian Code of Criminal Procedure article 53.4, "4. A family member or a close relative of a person who is not recognised as legally incapable in accordance with the established procedure but who, due to his old age, disability, illness or for other compelling reasons, is unable to properly exercise the rights granted by law may, upon a written or oral request, be permitted to participate in proceedings in the capacity a legal representative by a decision of a prosecutor or by a court ruling."

<sup>318</sup> Article 48a of the Code of Criminal Procedure. Under article 46(1) therein, aggrieved party is anyone who suffered harm due to a crime (e. g. to their health, property, morale, other harm, or to their other rights and freedoms). FORUM, [Briefing paper on barriers faced by defendants with intellectual and/or psychosocial disabilities in the Criminal Justice System in Czechia](#), Praha, ENABLE project, 2023, p.17. Otherwise, defendants may have presence of confidants only in cases where hearings are taking place with the general public excluded (e.g., sensitive cases), and confidants for defendants serve to oversee integrity of the proceedings, rather than communication support.

*Practical guidance and recommendations*

1. From the first contact with the authorities, persons with disabilities should **be informed of their right to be accompanied by a support person of their choice, that could include a family member. States should ensure that:**
  - A. if an individual with a disability so wishes, such trusted support persons can be present during all stages of the proceeding;
  - B. a procedure by which the role of such a support person is clearly determined and regulated;
  - C. no person with a disability is compelled to allow the participation of any such support persons in their legal affairs at any stage of legal proceedings against their will and preferences;
  - D. the role of an intermediary is not conflated with or replaced by a support person. The intermediary and the support person have different roles, and, where needed, provision for the participation of both should be made.
2. There should always be a **face-to-face contact with the trusted support person** if the individual with a disability desires such contact.

*Procedural adjustments and modifications*

Article 13 of the CRPD requires States to “ensure effective access to justice for persons with disabilities on an equal basis with others, including through the provision of procedural and age-appropriate accommodations.” The CRPD Committee, in its General Comment No. 1 on equality before the law, clarifies that persons with disabilities may need support to access justice and this support “could take various forms, including recognition of diverse communication methods, allowing video testimony in certain situations, procedural accommodation, the provision of professional sign language interpretation and other assistive methods.”<sup>319</sup>

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<sup>319</sup> CRPD Committee, General Comment No.1,para. 39.

### **International Principles and Guidelines on Access to Justice for Persons with Disabilities**

Procedures must be adopted for hearings that ensure the fair treatment and full participation of persons with disabilities. For instance:<sup>320</sup>

- (i) Adaptation of the venue;
- (ii) Appropriate waiting spaces;
- (iii) Removal of cloaks and wigs;
- (iv) Adjustments to the pace of proceedings;
- (v) Separate building entrances and waiting rooms and protective screens to separate persons with disabilities from others if necessary due to physical or emotional distress;
- (vi) Modifications to the method of questioning in appropriate circumstances, such as allowing leading questions, avoiding compound questions, finding alternatives to complex hypothetical questions, providing extra time to answer, permitting breaks as needed and using plain language;
- (vii) Use of pretrial video recording of evidence and testimony, if necessary, practical and possible, in such a manner as not to contravene basic rights, such as the right to confront and cross-examine witnesses;

At all stages of the process, if they choose so, persons with disabilities, may be accompanied by **family, friends or others** to provide emotional and moral support, without replacing, however, the role of an intermediary or facilitator.<sup>321</sup>

#### *Practical guidance and recommendations*

1. **The responsible State authorities should ensure that venues in the justice system where legal processes take place, including waiting areas, are always sufficiently adapted and accessible for persons with disabilities – and appropriate to the specific needs of the person.**
2. **In addition to a physical environment, responsible State authorities should consider adaptation of venues on a case-by-case basis in consultation with an**

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<sup>320</sup> UN, Special Rapporteur on the Rights of Persons with Disability, International Principles and Guidelines on Access to Justice for Persons with Disabilities (2020), Guideline 3.2 (c), p.16.

<sup>321</sup> Ibid. 319. Guideline 3.2(d).

**individual with disability, their intermediary and/or support person. The following could be considered:**

- A. Limiting the exposure of the defendants to the public or more generally their contact with other persons;<sup>322</sup>
- B. considering the seating and positioning to be adapted when needed (for instance lawyers sitting with their backs to the defendant with disability in court may need adaptation); and
- C. taking measures to ensure that the contact with the justice system is, as far as possible, not intimidating.

*On physical accessibility and facilities, see further [section IV.6](#).*

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<sup>322</sup> Judicial College (United Kingdom), 'Equal Treatment Bench Book' (February 2021), p 123.

## **B. Right to information and communication in accessible formats**

### **Right to information**

#### *International Human Rights Law and EU Law and Standards*

ICCPR article 19 (2) provides that “[e]veryone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.”

In the criminal justice context, this must be read in conjunction with ICCPR article 14(3)(a) and (b), which provides that “[i]n the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality (a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him; (b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing [...]”

The Human Rights Committee, in its General Comment No. 32,<sup>323</sup> has made clear that “[a]dequate facilities” must include access to documents and other evidence; this access must include all materials that the prosecution plans to offer in court against the accused or that are exculpatory. Exculpatory material should be understood as including not only material establishing innocence but also other evidence that could assist the defence (e.g. indications that a confession was not voluntary). In cases of a claim that evidence was obtained in violation of article 7 of the Covenant, information about the circumstances in which such evidence was obtained must be made available to allow an assessment of such a claim [...]”

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<sup>323</sup> UN Human Rights Committee, General Comment No. 32. Article 14: Right to equality before courts and tribunals and to a fair trial, CCPR/C/GC/32 (2007), para. 33.

Article 10.1 ECHR provides that “[e]veryone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers [...].” Article 6.3 a) also provides for a right to be informed providing that everybody who is charged with a criminal offence has the right “to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him [...].”

The EU Charter of Fundamental Rights does not present a specific reference to the right to be informed in the criminal justice setting but it recognizes freedom of expression in its article 11 stating that “[e]veryone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.”

According to article 21 of the CRPD, States must ensure that persons with disabilities can exercise the right to freedom of expression and opinion, including the freedom to seek, receive and impart information and ideas on an equal basis with others and through all forms of communication of their choice by:

“(a) Providing information intended for the general public to persons with disabilities in accessible formats and technologies appropriate to different kinds of disabilities in a timely manner and without additional cost.

(b) Accepting and facilitating the use of sign languages, Braille, augmentative and alternative communication, and all other accessible means, modes and formats of communication of their choice by persons with disabilities in official interactions.”<sup>324</sup>

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<sup>324</sup> Article 21(a),(b) CRPD.

Article 9(2)(f) of the CRPD provides that States must promote “appropriate forms of assistance and support to persons with disabilities to ensure their access to information.” The CRPD Committee has pointed out that:

“[p]ersons with intellectual and psychosocial disabilities as well as deaf-blind persons face barriers when attempting to access information and communication owing to a lack of easy-to-read formats and augmentative and alternative modes of communication.”<sup>325</sup>

For instance, in the Communication in *Medina Vela v. Mexico* No. 32/2015,<sup>326</sup> the CRPD Committee found a violation of article 9 in conjunction with article 4, as the State failed to ensure the accessibility of information during the criminal proceedings for the person with an intellectual disability, since no information was available to them in an accessible format.

Some examples of necessary adjustments for access to information can be found in the International Principles:

### **International Principles and Guidelines on Access to Justice for Persons with Disabilities**

**Principle 4:** Persons with disabilities have the right to access legal notices and information in a timely and accessible manner on an equal basis with others.<sup>327</sup>

Guideline: To guarantee the right to timely and accessible information, States shall:

- Enact enforceable laws, regulations, policies and guidelines that fully recognize the right to timely notice and information about all aspects of judicial processes;
- Ensure that information about justice systems and procedures can be accessed by various methods, including, as appropriate and needed:

<sup>325</sup> CRPD Committee, General Comment No. 2 (2014) Article 9: Accessibility, CRPD/C/GC/2 (22 May 2014), para. 7.

<sup>326</sup> Views adopted by the Committee under article 5 of the Optional Protocol concerning communication in *Medina Vela v. Mexico*, no. 32/2015, 15 October 2019, para. 10.5.

<sup>327</sup> UN, Special Rapporteur on the Rights of Persons with Disability, International Principles and Guidelines on Access to Justice for Persons with Disabilities (2020), Principle 4, p. 18.

- (1) Sign language;
- (2) Audio guides;
- (3) Telephone line advice and referral services;
- (4) Accessible websites;
- (5) Induction loop, radio or infrared systems;
- (6) Amplification devices and document magnifiers;
- (7) Closed captioning;
- (8) Braille;
- (9) Easy Read and plain language;
- (10) Facilitated communication;

- Ensure that all notices that require a response or an action to be taken (e.g. summonses, subpoenas, writs, orders and sentences) are available by accessible means and in accessible formats, such as those listed above in guideline 4.1 (b);

- Ensure that notices and information include clear, understandable information about how a procedure works, what to expect during a process, what is expected of a person, where to get help with understanding the process and the person's rights in the process, in language that is not merely a repetition of the statute, regulation, policy or guideline – for example, plain language;

- Ensure that support is available in real time for individuals who need assistance to understand notices and information by providing, for instance, interpreters, guides, readers, intermediaries and facilitators, and other forms of support.

According to Directive 2012/13/EU on the right to information in criminal proceedings, Member States must ensure that suspects or accused persons are informed of their procedural rights, including:

- the right of access to a lawyer;
- the right and conditions for receiving free legal advice;
- the right to be informed of the accusation;

- the right to interpretation and translation; and
- the right to remain silent.

Article 3 of Directive 2012/13/EU imposes an obligation on States to ensure that suspects and accused persons are informed of their rights “orally or in writing, in simple and accessible language, taking into account any particular needs of vulnerable suspects or vulnerable accused persons”. In addition, the EU Procedural Directives require that “(p)ersons with disabilities should receive upon request information concerning their procedural rights in a form accessible to them.”<sup>328</sup>

The Court of Justice of the EU (CJEU) has addressed the question of access to information of defendants with disabilities in case *C-467/2018*,<sup>329</sup> holding that: “Directive 2012/13 must be interpreted as meaning that persons suspected of having committed a criminal offence must be informed as soon as possible of their rights from the moment when they are subject to suspicions which justify, in circumstances other than an emergency, the restriction of their liberty by the competent authorities by means of coercive measures and, at the latest, before they are first officially questioned by the police.”

According to the EU Recommendation on procedural safeguards for vulnerable persons suspected or accused in criminal proceedings, “(p)ersons with disabilities should receive upon request information concerning their procedural rights in a format accessible to them.”<sup>330</sup> This provision is contrary to the CRPD, as information in accessible format should not only be provided to persons with disabilities “upon request”, but in line with the state’s obligation to provide procedural accommodations.

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<sup>328</sup> Commission Recommendation 2013/C-378/02 on procedural safeguards for vulnerable persons suspected or accused in criminal proceedings, section 3 – Rights of vulnerable persons, Right to information.

<sup>329</sup> CJEU, *C-467/2018*, *Rayonna prokuratura Lom v EP*, 19.09.2019, para. 76.

<sup>330</sup> Commission Recommendation of 27 November 2013 on procedural safeguards for vulnerable persons suspected or accused in criminal proceedings, Article 8.

### *Challenges*

According to the research undertaken by partners in the Enable project, there is often complete failure, with very few exceptions, of State authorities providing all necessary information to defendants with disabilities.<sup>331</sup> In the absence of full information, it is highly unlikely that any person – including a person with a disability – can participate equally and meaningfully in justice processes. In some instances, the failure to provide accessible information will not only result in discrimination, but will also prevent such individuals from enjoying a fair trial and deprive them of their legal capacity in violation of the CRPD.

Typically, only general provisions to inform defendants about their rights are provided for in legislation and administrative regulations of most EU Member States,<sup>332</sup> without any special consideration of the particular needs and rights of persons with disabilities.

In Slovakia, the law only contains a general requirement for “adequate explanation where necessary” of the process and procedural rights, but not specifically for defendants with disabilities.<sup>333</sup>

In Portugal, the right to information for persons with disabilities in criminal proceedings is equally compromised, as the Code of Criminal Procedure is not clear<sup>334</sup> about the

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<sup>331</sup> Pléna Inclusión, [Briefing paper on barriers faced by defendants with intellectual and/or psychosocial disabilities in the Criminal Justice System in Spain](#), Madrid, ENABLE Project, 2023, p.24; Mental Health Perspectives, [Briefing paper on barriers faced by defendants with intellectual and/or psychosocial disabilities in the Criminal Justice System in Lithuania](#), Vilnius, ENABLE project, 2023, p.12-13,

<sup>332</sup> FORUM, [Briefing paper on barriers faced by defendants with intellectual and/or psychosocial disabilities in the Criminal Justice System in Slovakia](#), Praha, ENABLE project, 2023, p.16.

<sup>333</sup> Ibid. 331. p. 20.

<sup>334</sup> According to Article 61(1)(c) and (h) of the Portuguese Penal Code, all defendants have the right to be informed of their rights and of the facts with which they are charged. However, Portuguese law has no express rule on guaranteeing the accessibility of language. The defendant has the right to be accompanied by his legal representative (who may be the accompanying person if he has been granted powers of representation, i.e. accompanying measures subject to representation rules). Moreover, according to Article 61(1)(i) last part of the Portuguese Criminal Code “when special circumstances based on his interests or the needs of the case so require, and only for as long as these circumstances persist” the person has the right to be accompanied “by another suitable person indicated by him and accepted by the competent judicial authority”.

right to receive this information in simple and accessible language, as recommended by Directive 2012/13/EU.<sup>335</sup>

In Slovenia, there is a lack of alternative provision of information in an easy-to-read format for persons with disabilities, from the first interaction with official authorities- usually the police- onward.<sup>336</sup> Persons with disabilities are frequently not fully informed of or otherwise unaware of the availability of procedural accommodations.

The Criminal Code of Bulgaria fails to provide any specific provisions to ensure that persons with disabilities are supported in overcoming the barriers faced in accessing information. Nor is provision made for the role of intermediaries to assist during interrogations, nor any other forms of communication support.<sup>337</sup> Only when a person has a “speech or hearing impairment”, is provision made for accommodation in the form of a sign language interpreter.<sup>338</sup> This creates a situation, in practice, where most defendants with disabilities do not understand anything about the proceedings and report feeling completely isolated,<sup>339</sup> instead of being provided information about their rights and the proceedings.

## **Communication Support**

### *International Human Rights Law*

Everyone is entitled to understand and be understood in all justice processes and procedures so that access to justice is guaranteed for all.

Article 2 of the CRPD defines “communication” to include languages, display of text, Braille, tactile communication, large print, accessible multimedia as well as written,

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<sup>335</sup> Portuguese Code of Criminal Procedure, Article 61.1, “1 Unless otherwise provided for by law, a defendant has, at all stages of proceedings, the right to: (...) h) Be informed on his rights by the judicial authority or criminal police body before which he must appear.” FENACERCI, [Briefing paper on barriers faced by defendants with intellectual and/or psychosocial disabilities in the Criminal Justice System in Portugal](#), Lisbon, ENABLE Project, 2023, p.40.

<sup>336</sup>PIC, [Briefing paper on barriers faced by defendants with intellectual and/or psychosocial disabilities in the Criminal Justice System in Slovenia](#), Ljubljana, ENABLE Project, 2023, p.55.

<sup>337</sup> ment, p.14-15.

<sup>338</sup> Article 142, para. 2 of the Bulgarian Criminal Code, Art. 106a of the Ministry of Internal Affairs Act.

<sup>339</sup> KERA Foundation, [Briefing paper on barriers faced by defendants with intellectual and/or psychosocial disabilities in the Criminal Justice System in Bulgaria](#), Veliko Tarnovo, ENABLE Project, 2023, p.21.

audio, plain-language, human-reader and augmentative and alternative modes, means and formats of communication, including accessible information and communication technology.<sup>340</sup> It also defines “language” to include spoken and signed languages and other forms of non-spoken languages.<sup>341</sup>

Under article 4 of the CRPD, States are obligated to undertake or promote research and development pertaining to the availability and use of new technologies, including information and communication technologies, mobility aids, devices, and assistive technologies. Such technologies must be suitable for persons with disabilities, giving priority to technologies at an affordable cost.<sup>342</sup> In addition, States must provide for accessible information to persons with disabilities about mobility aids, devices and assistive technologies, including new technologies, as well as other forms of assistance, support services and facilities.<sup>343</sup>

Under article 9 of the CRPD, States must take appropriate measures to ensure that persons with disabilities enjoy access, on an equal basis with others, to the broadest possible range of settings. Article 9 of the CRPD further specifies that

“These measures, which shall include the identification and elimination of obstacles and barriers to accessibility, shall apply to, inter alia: (a) Buildings, roads, transportation and other indoor and outdoor facilities, including schools, housing, medical facilities and workplaces; (b) Information, communications and other services, including electronic services and emergency services.”

For instance, States shall identify and eliminate the obstacles and barriers to accessibility to courts, police stations, or prisons.

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<sup>340</sup> Status of the Convention on the Rights of Persons with Disabilities (2006), accessible [here](#).

<sup>341</sup> Ibid. 339.

<sup>342</sup> Ibid. 339.

<sup>343</sup> Ibid. 339.

The CRPD Committee, in its General Comment No. 2, has specified that information and communications technology includes the internet, mobile phones, radio, television, computers and computer equipment.<sup>344</sup> States have a duty to make the internet and other information and communications technology accessible to persons with disabilities.<sup>345</sup>

The Committee further clarifies that article 9 of the CRPD requires that any public buildings and places should provide support for persons with disabilities, including clear signs in Braille and easy to understand formats; and communication and support services, including people who can guide persons with disabilities around the building or communicate in sign language.<sup>346</sup>

All processes in the justice system must provide the technical and other support necessary for defendants with disabilities to use any form of communication necessary<sup>347</sup> for their full participation, including:

- (i) assistive listening systems and devices (useful in case of hearing disabilities);<sup>348</sup>
- (ii) open, closed and real-time captioning, and closed caption decoders and devices (useful in case of hearing disabilities);<sup>349</sup> and
- (iii) voice, text and video-based telecommunications products (useful in case of hearing disabilities);
- (iv) videotext displays (useful in case of hearing disabilities );<sup>350</sup>
- (v) screen reader software, magnification software and optical readers (useful in case of visual disabilities);<sup>351</sup> and

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<sup>344</sup> CRPD Committee, General Comment No. 2 (2014) on Article 9: Accessibility, CRPD/C/GC/2 (2014).

<sup>345</sup> Ibid. 343.

<sup>346</sup> Ibid. 343.

<sup>347</sup> UN, Special Rapporteur on the Rights of Persons with Disability, International Principles and Guidelines on Access to Justice for Persons with Disabilities (2020), Guidelines 3.2(e), p 16.

<sup>348</sup> For instance see: <https://www.nidcd.nih.gov/health/assistive-devices-people-hearing-voice-speech-or-language-disorders>

<sup>349</sup> For instance see: <https://www.washington.edu/doi/what-difference-between-open-and-closed-captioning>

<sup>350</sup> <https://nationaldisabilitynavigator.org/ndnrc-materials/disability-guide/computer-aided-real-time-transcription-cart/>

<sup>351</sup> <https://www.afb.org/blindness-and-low-vision/using-technology/using-computer/part-ii-experienced-computer-user-new-0>

- (vi) video description and secondary auditory programming devices that pick-up audio feeds for television programmes (useful in case of hearing disabilities).

Suitability of telephone- and video-conferencing should be determined on a case-by-case basis.<sup>352</sup> In some instances they will be totally unsuitable for persons with disabilities. In others they will require modification of settings and modes, and in some their use may significantly enhance the ability of individuals with disabilities to participate in legal processes.

In addition to intermediaries and trusted persons discussed above, other support persons may assist individuals with disabilities in a variety of ways. Such persons might include:

- (i) Note-takers (which may be useful in cases of hearing disabilities, psycho-social disabilities, and cognitive or learning related disabilities);
- (ii) qualified sign language and oral interpreters (useful in case of hearing and speech related disabilities);<sup>353</sup> and relay services (useful in cases of hearing and speech related disabilities);<sup>354</sup>

and

- (iii) tactile interpreters (useful in case of hearing or visual disabilities).<sup>355</sup>

One of the barriers to participation can be the type of language used by the legal system – by judges, legal representatives and court administration.<sup>356</sup> For instance, the legal language might constitute a barrier for people with acquired brain injury, people with autistic spectrum disorder, or people with an intellectual disability. Even if the defendant has been identified as falling somewhere within these categories, there is

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<sup>352</sup> International Commission of Jurists, “The Courts and COVID-19” (5 May 2020), p. 5.

<sup>353</sup> <https://nationaldisabilitynavigator.org/ndnrc-materials/disability-guide/sign-language-interpreters/>.

<sup>354</sup> <https://nationaldisabilitynavigator.org/ndnrc-materials/disability-guide/telecommunications-relay-service-2/>.

<sup>355</sup> <https://wfdb.eu/interpretation/>

<sup>356</sup> Judicial College (United Kingdom), ‘Equal Treatment Bench Book’ (February 2021), p. 35.

still a need to avoid assumptions about the defendant's understanding and to assess the possible difficulties case by case.<sup>357</sup>

### *Challenges*

In Slovakia, there is no legislation establishing the need to make provision for easy-read, sign language interpreters, Braille, or any other accessible forms of communication, and there is no evidence of any widespread practice in this regard.<sup>358</sup>

Similarly, in the Czech Republic, defendants with disabilities generally do not receive any communication support. The only exceptions identified in the national study are the right to an interpreter in all cases in which the defendant does not understand Czech, and the use of deaf and deaf-blind persons communication systems in courts.<sup>359</sup>

The national study in Spain focused on the difficulties faced by defendants with intellectual and psychosocial disabilities in their contact with judges and prosecutors. Defendants who were not provided with communication support commonly indicated that they did not understand anything when questioned by a judge or prosecutor.<sup>360</sup> Such defendants have complained that judges and prosecutors spoke too quickly and used complicated language which they could not understand. Only two out of seven of the interviewed defendants benefited from an intermediary who tried to assist the lawyers involved in the case to make the communication more understandable.<sup>361</sup>

In Spain, although there are easy-to-read tools available for when police or prisons are confronted with a person with a disability, there are apparently no other available

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<sup>357</sup> Australian Disability Access Bench Book, available at [Disability Access Bench Book \(judicialcollege.vic.edu.au\)](https://www.judicialcollege.vic.edu.au/).

<sup>358</sup> FORUM, [Briefing paper on barriers faced by defendants with intellectual and/or psychosocial disabilities in the Criminal Justice System in Slovakia](#), Praha, ENABLE project, 2023, p.17.

<sup>359</sup> FORUM, [Briefing paper on barriers faced by defendants with intellectual and/or psychosocial disabilities in the Criminal Justice System in Czechia](#), Praha, ENABLE project, 2023, p.37.

<sup>360</sup> Plena Inclusión, [Briefing paper on barriers faced by defendants with intellectual and/or psychosocial disabilities in the Criminal Justice System in Spain](#), Madrid, ENABLE Project, 2023, p.28.

<sup>361</sup> *Ibid.* 359. p. 25.

methods of support involving, for example, augmentative and alternative systems of communication.<sup>362</sup>

In Romania, defendants with disabilities face similar communication problems. The Romanian Civil Procedure Code does not require the adaptation of language and information to accommodate persons with disabilities.<sup>363</sup> Moreover, in the Romanian Criminal Code, there is a general obligation to provide information to defendants prior to their first hearing, but the Code does not specifically refer to the obligation to adapt the language and to communicate the information in an accessible way when dealing with persons with a disability. This information deficit is compounded by the lack of internal regulations and procedures to ensure that the accused fully understands the information they receive.<sup>364</sup> In practice, defendants with disabilities frequently do not have effective access to accessible information.

## **Right to interpretation and translation**

### *International Human Rights Law and EU Law and Standards*

ICCPR Article 14.3.h provides as a minimum guarantee that everyone shall be entitled, “in full equality”, “to have the free assistance of an interpreter if [they] cannot understand or speak the language used in court.”

ECHR Article 6.3.e provides for similar guarantees.

Persons with disabilities have a right to access interpretation and translation services in order to ensure their effective participation in the justice process. Such interpretation and translation services may be especially important for persons with visual or hearing disabilities.<sup>365</sup>

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<sup>362</sup> Ibid. 360.

<sup>363</sup> Centre for Legal Resources, [Briefing paper on barriers faced by defendants with intellectual and/or psychosocial disabilities in the Criminal Justice System in Romania](#), Bucharest, ENABLE Project, 2023, p. 21.

<sup>364</sup> Ibid. 362. p.12.

<sup>365</sup> See article 13 of the Convention on Persons with Disabilities.

The United Nations Office of the High Commissioner for Human Rights gives examples of ways the CRPD Committee has shown that procedural accommodations can be made through:

“[p]rovision of sign language interpretation, legal and judicial information in accessible formats for, multiple means of communication, easy read versions of documents, Braille and video link testimony, among others.”<sup>366</sup>

According to Directive 2010/64/EU on the right to interpretation and translation in criminal proceedings, States must ensure that suspects or accused persons who do not speak or understand the language of the criminal proceedings are provided with interpretation. This includes the provision of assistance for persons with “hearing or speech impediments”, as well as written translation of all essential documents, to ensure that the persons are able to exercise their right of defence and to safeguard the fairness of the proceedings.<sup>367</sup>

The Directive applies to people who require accommodations and supports, because of any “physical impairment” which affects their ability to communicate effectively.<sup>368</sup>

Article 2 provides that persons suspected or accused, who do not speak or understand the language of the criminal proceedings, must be provided with interpretation without delay. Such interpretation services must be provided for proceedings before investigative and judicial authorities. It clearly is sufficiently broad, particularly if interpreted consistently with the CRPD, to include interpretation services required by persons with disabilities, including sign language interpretation.

Article 2.3 provides that the right to interpretation includes the provision of appropriate assistance for persons with hearing or speech impediments.

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<sup>366</sup> UN OHCHR, ‘Report - Right to access to justice under article 13 of the Convention on the Rights of Persons with Disabilities’ (December 2017), A/HRC/37/25, para. 24.

<sup>367</sup> Directive 2010/64/EU of the European Parliament and of the Council – articles 1, 2, 4 and 5;

<sup>368</sup> *Ibid.* Preamble para. 27.

Recital 27 refers to people who are in “a potentially weak position”, in particular because of any physical impairment which affects their ability to communicate effectively.<sup>369</sup> While this language is inappropriate and discriminatory, interpreted consistently with the CRPD, the Recital should be understood to require the provisions of interpretation services as forms of procedural accommodations necessary to ensure equal access to justice for persons with disabilities.

The Directive further states that communication technology such as videoconferencing, telephonic devices or the internet may be used in order to guarantee the fairness of the proceeding<sup>370</sup> and that a register of appropriately qualified interpreters should be established.<sup>371</sup>

Article 6 of the Directive also provides that judicial staff must be trained in communicating with persons who do not speak or understand the language with the assistance of an interpreter.

Apart from interpretation for persons with “hearing or speech impediments”, the Directive does not contain any specific support for persons with disabilities with other needs. This absence constitutes a loophole in EU legislation, which ought to be directly addressed. Irrespective of this deficiency, justice actors nonetheless must act in compliance with State obligations under the CRPD. These should be construed and interpreted in line with the CRPD Committee’s jurisprudence and the International Principles to ensure fair, non-discriminatory access to justice for persons with disabilities.

### *Challenges*

Persons with disabilities have the right to access information and to communicate at all stages of the proceeding. States must take all appropriate measures to ensure that

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<sup>369</sup> Recital 27, Directive 2010/64/EU.

<sup>370</sup> Directive 2010/64/EU article 2.6.

<sup>371</sup> Ibid. article 5.2.

persons with disabilities know their rights and the procedure and can effectively and fully access justice. States do not only have to guarantee them access to information from the first contact with law enforcement authorities, but they also have to accommodate all their communication, support, and language needs. Therefore, States must guarantee communication tools, technical support, alternative formats for documents and information, easy-to-read documents, interpretation and translation services, and intermediaries if needed.

Access to specific procedural accommodations and interpretation and translation services is typically very limited in EU Member States, in contravention of legal obligations.

For instance, in Bulgaria, the Criminal Code provides for a sign language interpreter for defendants with “speech or hearing impairments.”<sup>372</sup> Any other interpretation needs are entirely up to the discretion of the investigating and judicial authorities, with no guarantees for defendants with disabilities that decisions in this respect will be made in due course.<sup>373</sup>

In Romania, the Criminal Code allows for certain procedural accommodations for some categories of persons, which may include persons with disabilities, even though persons with disabilities are not explicitly mentioned.<sup>374</sup>

In Lithuania, according to the national study,<sup>375</sup> in situations where sign language interpretation was necessary, it is provided.

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<sup>372</sup> Article 395, item “з” of CPC.

<sup>373</sup> KERA Foundation, [Briefing paper on barriers faced by defendants with intellectual and/or psychosocial disabilities in the Criminal Justice System in Bulgaria](#), Veliko Tarnovo, ENABLE Project, 2023, p.10.

<sup>374</sup> Centre for Legal Resources (CLR), [Briefing paper on barriers faced by defendants with intellectual and/or psychosocial disabilities in the Criminal Justice System in Romania](#), Bucarest, ENABLE Project, 2023, p. 17

<sup>375</sup> Mental Health Perspectives, [Briefing paper on barriers faced by defendants with intellectual and/or psychosocial disabilities in the Criminal Justice System in Lithuania](#), Vilnius, ENABLE Project, April 2023, p.9.

*Practical guidance and recommendations*

1. **Every person with a disability has the right to make choices for themselves, and should have access to all the relevant information and support required to do so from the first contact with law enforcement authorities. Pursuant to this obligation:**
  - A. Information should be shared with defendants at all stages of the proceedings, including but not limited to the pre-trial phase, during the trial, and post-trial information.
  - B. **Information on existing support resources and accommodations** for persons with disabilities, as well as on how to access and use them, should be available and clearly communicated to persons with disabilities.
  - C. **An appointment of an intermediary and/or other support person(s)** should be considered and where necessary effectuated, in order to significantly help in communication and ensure that all relevant information is transmitted to and communicated by the defendant.
2. **The police authorities and other justice professionals must ensure that individuals with disabilities understand their rights and all relevant legal procedures and processes.**
3. **Justice professionals must ensure that at all stages of the proceedings, defendants with disabilities are provided with accessible and understandable information about their rights, including:**
  - A. the right not to incriminate oneself;
  - B. what is likely to happen in the applicable legal procedure;
  - C. the rules of places of detention; and

- D. that they can rely on the support of the public institutions **starting with their first contact** with the justice system.
4. **When sharing information, the responsible authorities should ensure that it is being communicated in a way that is accessible to the defendant, with regard to their specific communication needs. Language needs to be adapted to the individual communication needs.**
- A. Justice professionals should have access to a **list of concrete tools** (including the tools from the International Principles) and clear guidance and examples on how to use them to facilitate effective communication with individuals with disabilities.
- B. Where necessary, information should be presented in a simplified, comprehensible, easy-to-understand format or manner.
- C. Specifically, justice actors shall adapt the following elements: the speed and tone of delivery, level of vocabulary, level of grammar, and the complexity of questions. While adapting their language, justice actors should also consider the defendants' ability to narrate independently and to understand questions related to time, their orientation and distance, and their level of literacy.<sup>376</sup>
- D. Ensure the pace of the proceedings is well adjusted – ensure for instance rather short sessions, frequent breaks.<sup>377</sup>
5. **Written information** should be available in alternative formats: justice actors must ensure the elaboration of and provision of access to easy-to-read documents.

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<sup>376</sup> Access Ability Australia (AAA), The Capital. Social Story, available at [A-visit-to-The-Capital-Social-Story-V1.pdf \(accessabilityaustralia.com\)](#), p. 6.

<sup>377</sup> Justice Intermediary Starter Kit, Module 7 Accommodations, p.5.

6. Responsible authorities should ensure that information about court procedures, including notices that require a response or an action to be taken, including summonses, subpoenas, writs, orders and sentences, is **provided in accessible formats**.<sup>378</sup>
  
7. **Responsible authorities should at all stages of the proceedings ensure that all court processes provide the technical and other support necessary for defendants with disabilities to use any form of communication necessary for their full participation.**<sup>379</sup> These forms of communication may, among others, require the use of:
  - A. assistive listening systems and devices;
  - B. open, closed and real-time captioning, and closed caption decoders and devices;
  - C. voice, text and video-based telecommunications products;
  - D. videotext displays;
  - E. computer-assisted real-time transcription;
  - F. screen reader software, magnification software and optical readers; and
  - G. video description and secondary auditory programming devices that pick up audio feeds for television programs.
  
8. **Responsible authorities should provide communication support, including through third-parties, for example**

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<sup>378</sup> Accessible formats include: Sign language; Video and audio guides; Telephone line advice and referral services; Accessible websites; Induction loop, radio or infrared systems; Closed captioning; Braille; Easy Read and plain language; Facilitated communication; and amplification devices and document magnifiers.

<sup>379</sup> These include- Assistive listening systems and devices; Open, closed and real-time captioning, and closed caption decoders and devices; Voice, text and video-based telecommunications products; Videotext displays; Computer-assisted real-time transcription; Screen reader software, magnification software and optical readers; Video description and secondary auditory programming devices that pick up audio feeds for television programmes.

- A. note-takers;
- B. qualified sign language and oral interpreters;
- C. relay services; and
- D. tactile interpreters, where and when necessary.

**9. Responsible authorities should provide justice professionals with communication tools to use in communication with persons with disabilities.**

For instance:

- A. the [AAC pictograms browser](#)<sup>380</sup> and an [example of use](#),<sup>381</sup>
- B. an example of a “[communication board](#)”,<sup>382</sup>
- C. [easy-to-read guidelines](#),<sup>383</sup> andd
- D. how to write [a social story](#)<sup>384</sup> and an [example of use](#).<sup>385</sup>

**10. The right to interpretation and translation should be fulfilled at all stages of the proceedings. Translators, interpreters, and intermediaries play different roles, but sometimes an intermediary can be helpful in fulfilling the right to interpretation and translation.**

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<sup>380</sup> Aragonese Center of Augmentative and Alternative Communication (ARASAAC) website available at [AAC Symbols and shared resources - ARASAAC; the Augmentative and Alternative Systems of Communication \(AAC\) are ways of expression different from spoken language, that aim at increasing and/or compensating for the difficulties of communication and language of many people with disabilities. For instance, they can be used to better communicate with persons presenting cerebral palsy \(CP\), intellectual disability, autism spectrum disorders \(ASD\), neurological diseases such as amyotrophic lateral sclerosis \(ALS\), multiple sclerosis \(MS\) or Parkinson's disease, muscular dystrophies, traumatic brain injuries, aphasias.](#)

<sup>381</sup> OHCHR, Making sure people with disabilities get justice - EasyRead version of: International Principles and Guidelines on access to justice for persons with disabilities, available at [ISL133 20 ER UN Access to Justice \(ohchr.org\)](#).

<sup>382</sup> Access Ability Australia (AAA), Communication Board. Workshops and Meetings; [Communication boards use symbols to share ideas, wants, needs, and thoughts, assisting individuals with communication challenges. They are typically used with persons with intellectual disabilities, autism spectrum, learning disabilities, traumatic brain injuries, dementia, or deafness.](#)

<sup>383</sup> Mencap, Am I making myself clear? Mencap's guidelines for accessible writing (2002) available at [guidelines for accessible writing.pdf \(funding4sport.co.uk\); For instance, they can be employed to communicate with people with intellectual disabilities, learning disabilities, or autism spectrum.](#)

<sup>384</sup> Autism Services, Education, Resources and Training (ASERT) website, available at [How to Create a Social Story — PAAutism.org, an ASERT Autism Resource Guide; Social stories help people to react to social situations that amy be challenging like appearing in court, being detained or being arrested. They are typically used to communicate with people with autism spectrum.](#)

<sup>385</sup> Access Ability Australia (AAA), The Capital. Social Story

### *Systemic recommendations*

1. The responsible authorities should act to ensure that all **communication support persons** are able to interpret effectively, accurately and impartially, both receptively (understanding what persons with disabilities are saying) and expressively (having the skill necessary to convey information back to those persons), while using any necessary specialized vocabulary, such as legal or medical language, and respecting professional and ethical standards;
2. The responsible authorities should act to **provide for adequate training** on communication tools and methods for all justice professionals, including by ensuring the language barrier is overcome through training of justice actors as well as training on the rights of persons with disabilities of the all other relevant professionals like interpreters and intermediaries.

#### **Promising practice**

According to the Australian Disability Access Bench Book, an easy way to avoid this language barrier is to avoid using legal terminology and to use instead concrete and plain language. For instance, the judges and legal representatives should use the verb “to follow” instead of the verb “to comply”. Judges and legal practitioners should also explain particular terms and check during the hearing whether the defendant understands the meaning of specific words.<sup>386</sup>

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<sup>386</sup> Australian Disability Access Bench Book, available at [Disability Access Bench Book \(judicialcollege.vic.edu.au\)](http://judicialcollege.vic.edu.au).

## C. Right of access to a lawyer and to legal aid

### International Human Rights Law and EU Law and Standards

#### *International Human Rights Law*

The ICCPR in article 14(3)(d) provides for the right to defend one's self "in person or through legal assistance of [one's] own choosing; to be informed, if [one] does not have legal assistance, of this right; and to have legal assistance assigned to [them], in any case where the interests of justice so require, and without payment by [them] in any such case if [they] does not have sufficient means to pay for it." This includes at pre-trial phases.

The ECHR recognizes the right of access to a lawyer and to legal aid in its article 6.3. Article 6.3.c provides for everyone charge with a criminal offence the right "to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require [...]."

Under the CRPD all persons have a right to equality and equal treatment before the courts and tribunals and more generally in all justice processes and procedures.<sup>387</sup> States have legal obligations to ensure effective access to justice for persons with disabilities on an equal basis with others. Every person who is arrested or detained (whether or not they are detained on a criminal charge) and every individual facing a criminal charge (whether or not they are detained) has the right to the assistance of legal counsel.<sup>388</sup> The assistance of counsel is one of the primary means of protecting the human rights of individuals accused of criminal offences, and in particular their right to a fair trial. Whether or not individuals are assisted by a lawyer often determines whether or not they can participate in legal proceedings in a meaningful way.<sup>389</sup>

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<sup>387</sup> CRPD article 13.1.

<sup>388</sup> Article 14 ICCPR, Article 13 CRPD, HRC General Comment 32, para. 34.

<sup>389</sup> HRC General Comment 32, §10.

## **International Principles and Guidelines on Access to Justice for Persons with Disabilities**

**Principle 6: “Persons with disabilities have the right to free or affordable legal assistance.”**

Guidelines:

6.1 To guarantee the right to a fair trial, States shall provide free or affordable legal assistance to (...) persons with disabilities in all legal procedures and proceedings that relate to violations of human rights or fundamental freedoms or those that could negatively affect such rights or freedoms, in particular the rights to life, liberty, personal integrity, property, adequate housing, decisionmaking autonomy and family integrity. Legal assistance must be competent and available in a timely manner for persons with disabilities to participate equally in any legal proceedings.

6.2 To that end, States shall:

- (a) Enact and implement laws, regulations, policies, guidelines and practices affording the right to legal assistance in all judicial and quasi-judicial proceedings, regardless of the role of persons with disabilities in the process or the possible consequences or outcomes; (...)
- (d) Ensure, in addition to legal assistance, access to legal advice through, for example, telephone or digital gateway services, paralegal services and online legal help services, using assistive technology as necessary;
- (e) Repeal or amend any laws, regulations, policies, guidelines or practices that restrict the legal capacity of persons with disabilities to retain and instruct a lawyer; (...)
- (f) Ensure easy access to legal assistance, removing all administrative, communication and physical barriers to such access;
- (h) Make procedural accommodations, such as interpreters, assistive technology and intermediaries and facilitators, or the resources necessary to obtain such accommodations, available to lawyers to support effective communication with clients, witnesses and other persons with disabilities in the discharge of their professional duties; (...).

Legal aid must be available for all those who cannot afford to pay for legal services.<sup>390</sup> States should implement laws and policies that ensure that the information needed by persons with disabilities to defend their rights is accessible, and that free and affordable legal aid is provided to persons with disabilities in all legal matters.<sup>391</sup> As the CRPD Committee has clarified:

“Legal aid is an essential element of a fair, humane and efficient system of administration of justice that is based on the rule of law. It is a foundation for the enjoyment of other rights, including the right to a fair trial and the right to an effective remedy, a precondition to exercising such rights and an important safeguard that ensures fundamental fairness and public trust in the administration of justice.”<sup>392</sup>

The ICCPR provides for the right of accused persons to choose their lawyer and recognizes their right to be informed of their right to legal aid. Moreover, individuals who do not have access to legal assistance have the right to free legal assistance “in any case where the interests of justice so require” and where such individuals cannot afford to pay for a lawyer.<sup>393</sup>

Article 6.3 c) ECHR also recognizes the right of the accused persons to choose their lawyer and their right to free legal aid in case they do not have sufficient means to pay for legal assistance. The article 47 of the EU Charter of Fundamental Rights provides that “[...] Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice.”

In its General Comment 6, the CRPD Committee had affirmed that effective enjoyment of the rights to equality and non-discrimination calls for the adoption of enforcement

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<sup>390</sup> UN Human Rights Committee, General Comment No. 32. Article 14: Right to equality before courts and tribunals and to a fair trial, CCPR/C/GC/32 (2007) para. 10-11.

<sup>391</sup> UN OHCHR, ‘Report - Right to access to justice under article 13 of the Convention on the Rights of Persons with Disabilities’ (December 2017), A/HRC/37/25, para 63.

<sup>392</sup> Report of the UN Special Rapporteur on the independence of judges and lawyers, Legal aid, UN Doc. A/HRC/23/43 (9 April 2013)

<sup>393</sup> ICCPR article 14.3d.

measures, such as: “[s]ufficient and accessible provision of legal aid to ensure access to justice for the claimant in discrimination litigation.”<sup>394</sup> Affordable quality legal aid must also be available to persons with disabilities in relation to effective redress mechanisms and to ensure access to justice.<sup>395</sup> The CRPD Committee has therefore prescribed that “appropriate and [...] affordable quality legal aid” be offered to persons with disabilities, on a means- and merits-tested basis.<sup>396</sup> Elsewhere, the CRPD Committee has also provided further guidance on this right, emphasizing the importance of training of justice actors in respect of procedural accommodations:

“On the question of the *right of access to legal representation* proper consideration should be given to articles 4(i) and 13 of the CRPD in order to train public and private defenders, judges, prosecutors, and prison staff to properly apply the relevant procedural accommodations to give access to persons with disabilities, on an equal basis with others, to the general procedures provided in national legislation. Also, there needs to be an awareness of the instances in which certain practices of the criminal system against persons with disabilities should be considered as a form of torture and ill-treatment.”<sup>397</sup>

According to Principle 6 of the International Principles, States should “(c)reate, fund and implement legal assistance programmes to provide free legal representation to persons who cannot afford to retain legal assistance, including persons with disabilities [...]”<sup>398</sup> The same Principle indicates that legal aid is accessible to persons with disabilities at conditions as favourable as the ones for persons without disabilities.

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<sup>394</sup> CRPD, General Comment No. 6, para. 31.g.

<sup>395</sup> *Ibid.*, para. 73h.

<sup>396</sup> Committee on the Rights of Persons with Disabilities, “General Comment No. 6 (2018) on equality and non-discrimination”, CRPD/C/GC/6 (26 April 2018), para. 73(h).

<sup>397</sup> Observations on the Standard Minimum Rules for the Treatment of Prisoners prepared by the Committee on the Rights of Persons with Disabilities, 2013, para. 3.

<sup>398</sup> UN, International Principles and Guidelines on Access to Justice for Persons with Disabilities (2020), Principle 6.2 (b).

Under the Principle, States should pay special attention to guarantee legal assistance to persons with disabilities who are victims of violence.<sup>399</sup>

In the case of *Nenov v. Bulgaria*, which concerned an applicant diagnosed with schizophrenia, the ECtHR held that failure to provide legal aid to persons with disabilities would violate their right to a fair trial where such an individual has difficulty understanding the judicial proceedings, thus preventing them from adequately ensuring the protection of their interests.<sup>400</sup> In line with the CRPD, this precedent should be applied more broadly to all persons with disabilities, and defendants with intellectual and/or psychosocial disabilities in particular.

### *EU Law and Standards*

This Principle is also guaranteed by article 47 of the EU Charter through the provision of legal aid by a suitably qualified and experienced lawyer. Such representation can serve as the bridge of communication and information for persons with disabilities and can, if the lawyer in question has appropriate knowledge and experience in communicating with and representing persons with disabilities, be the single most important factor to ensure their effective participation.<sup>401</sup> This should be considered in addition to the right to other appropriate support persons such as intermediaries as discussed above. A legal representative, regardless of understanding and experience, cannot by itself replace the role of all other support persons.

Directive 2013/48/EU on the right of access to a lawyer in criminal proceedings sets out the minimum standards concerning the rights of suspects and accused persons. Accused and suspected persons must enjoy the right to access to a lawyer; have a third party informed of the deprivation of liberty; and have the means to communicate, without undue delay, with third persons and with consular authorities while deprived of

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<sup>399</sup> Ibid. Principle 6.2 (c) and 6.2 (k).

<sup>400</sup> *Nenov v. Bulgaria*, ECtHR, Application no. 33738/02 (2009), para. 52.

<sup>401</sup> Validity Foundation, [Humanising Justice: International report from Voices for Justice: Communicating with Victims of Crime with Disability](#), 2022, p. 68.

liberty. As pointed out by the European Commission, “if a vulnerable person is unable to understand and follow the proceedings, the right to access to a lawyer in accordance with Directive 2013/48/EU should not be waived.”<sup>402</sup> This undoubtedly applies to persons with disabilities.

According to EU Directive 2016/1919, Member States “shall ensure that suspects and accused persons who lack sufficient resources to pay for the assistance of a lawyer have the right to legal aid when the interests of justice so require”.<sup>403</sup> Furthermore, in terms of Recital 29 “[...] Member States should respect and guarantee the rights set out in this Directive, without any discrimination based on any ground such as [...] disability.”<sup>404</sup>

### *Challenges*

Given the obstacles described above, lawyers are sometimes be the only persons in the judicial system who will be in a position to provide adequate assistance to the defendant during the criminal proceeding. They, therefore, have an important supportive role to play to persons with disabilities. The need to apply for legal assistance can be a serious administrative burden for any individual, and especially for persons with disabilities, rendering legal assistance inaccessible.<sup>405</sup>

Lawyers may also be best positioned to inform an accused/defendant with a disability and/or justice actors of their client’s need for and right to procedural accommodations to ensure their effective access to justice. Where other support persons are not

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<sup>402</sup> Commission Recommendation 2013/C-378/02 on procedural safeguards for vulnerable persons suspected or accused in criminal proceedings, section 3 – Rights of vulnerable persons, Right of access to a lawyer, para. 11.

<sup>403</sup> Article 4.1.

<sup>404</sup> Ibid. 401. Recital 29: *This Directive should apply to suspects, accused persons and requested persons regardless of their legal status, citizenship or nationality. Member States should respect and guarantee the rights set out in this Directive, without any discrimination based on any ground such as race, colour, sex, sexual orientation, language, religion, political or other opinion, nationality, ethnic or social origin, property, disability or birth. This Directive upholds the fundamental rights and principles recognised by the Charter and by the ECHR, including the prohibition of torture and inhuman or degrading treatment, the right to liberty and security, respect for private and family life, the right to the integrity of the person, the rights of the child, the integration of persons with disabilities, the right to an effective remedy and the right to a fair trial, the presumption of innocence, and the rights of the defence. This Directive should be implemented in accordance with those rights and principles.*

<sup>405</sup> Ibid. p.11.

available contrary to the requirements of the CRPD, lawyers may be best positioned to advise accused/defendants of their right to challenge the fairness of the legal process and, potentially, seek to have it declared unlawful.

The lack of specialized knowledge among lawyers can substantially affect the fate of persons with disabilities in general and that of individuals with intellectual and/or psychosocial disabilities in particular. The lawyer has a primary responsibility to ensure that the human rights and fundamental freedoms of their client are respected and substantial training is needed to ensure their ability to do so.

The EU Law and Standards provides for the right to a lawyer, but establishes little to no guidance to lawyers and justice actors when the defendant is a person with a disability. For instance, in Bulgaria, there is no set of rules, regulations or guidelines that govern a lawyers' responsibilities when their client has a disability and there are no special knowledge or experience requirements for lawyers who work with persons with disabilities.<sup>406</sup> Even where defendants with disabilities are provided with a lawyer, they are commonly interviewed by the police, and sometimes even arrested or hospitalized in psychiatric institutions before they access any legal representation.<sup>407</sup> These are processes in which the services of a lawyer are often critical in securing the protection of their rights and the expression of their legal capacity.

In Romania, legal assistance for suspects or defendants is compulsory where they are placed in medical confinement because a judicial body considers such persons would not be able to defend themselves, and in cases where the law provides life imprisonment or imprisonment for more than five years for the offence committed.<sup>408</sup> In

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<sup>406</sup> KERA Foundation, [Briefing paper on barriers faced by defendants with intellectual and/or psychosocial disabilities in the Criminal Justice System in Bulgaria](#), Veliko Tarnovo, ENABLE Project, 2023, p.15.

<sup>407</sup> Ibid. 405. p.22.

<sup>408</sup> Article 90 para. (1) - Mandatory legal assistance provided to a suspect or defendant, Criminal code, Romania.

Centre for Legal Resources, [Briefing paper on barriers faced by defendants with intellectual and/or psychosocial disabilities in the Criminal Justice System in Romania](#), Bucarest, ENABLE Project, 2023, p.22.

practice, however, not all such defendants have prompt, direct and confidential access to a lawyer before their interrogation.<sup>409</sup>

In general, legal aid is not always available, especially for people who have been imprisoned. Some persons with disabilities have reported an inability to access a lawyer, because the fees and costs of legal services are unaffordable.<sup>410</sup> Sometimes problems are also encountered when the lawyers are changed during an ongoing proceeding. Some defendants even had a different lawyer at each judicial term and they did not have the opportunity to meet their lawyer before the hearing.<sup>411</sup>

In Slovenia, legal aid depends on financial circumstances of a defendant or their family. Although exceptional legal aid can be granted to persons with disabilities in some circumstances, the criteria and financial threshold are set too high effectively depriving many persons in need of such support of access to legal aid.<sup>412</sup>

Legal aid is also apparently insufficient in Lithuania.<sup>413</sup> On one hand, defendants have noted a practical distinction between private and ex officio (“government”) lawyers, and report experiences that government lawyers often do not give full attention to their clients, do not provide them with sufficient information and are not perceived to be “on their side”.<sup>414</sup>

On the other hand, according to the Criminal Procedural Code, there are situations in which legal aid is granted to the suspects and defendants regardless of their financial status. For instance, persons with disabilities are required to have legal representation when it is in the interests of justice for such provision to be made. In the context of persons with disabilities this means that such access is only compulsory where the

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<sup>409</sup> Ibid. 407. p.41.

<sup>410</sup> Centre for Legal Resources (CLR), [Briefing paper on barriers faced by defendants with intellectual and/or psychosocial disabilities in the Criminal Justice System in Romania](#), Bucarest, ENABLE Project, 2023, p.41.

<sup>411</sup> Ibid. p. 23.

<sup>412</sup> PIC, [Briefing paper on barriers faced by defendants with intellectual and/or psychosocial disabilities in the Criminal Justice System in Slovenia](#), Ljubljana, ENABLE Project, 2023, p. 56.

<sup>413</sup> Mental Health Perspectives, [Briefing paper on barriers faced by defendants with intellectual and/or psychosocial disabilities in the Criminal Justice System in Lithuania](#), Vilnius, ENABLE Project, April 2023, p. 15.

<sup>414</sup> Ibid. 412. p.13.

disability has been formally “diagnosed” and is on the record. The “compulsory” legal representation of persons with disabilities by specific lawyers against the will and preference of an individual with a disability is not always and appropriate practice required in all circumstances.<sup>415</sup>

In Portugal, the law formally guarantees legal aid for suspects and accused persons in criminal proceedings.<sup>416</sup> However, there are other challenges that can hinder the effective exercise of this right of access to a lawyer. For example, the lack of training of lawyers on the human rights of persons with disabilities may be a barrier to the participation of persons with disabilities in the justice system. Persons who are subjected to involuntary hospitalizations have sometimes experienced only very brief or non-existent contacts with lawyers, despite a lawyer having been formally appointed to the case and have expressed dissatisfaction that their voices were not heard.<sup>417</sup>

Similarly, in the Czech Republic, effective access to justice in practice is usually dependent on the approach of individual lawyers, who are not always supportive of their clients.<sup>418</sup>

By contrast, in Spain the experiences of defendants with disabilities in their contact with their lawyers, seem, generally to have been positive.<sup>419</sup> The Spanish Supreme Court has established that the right to legal representation is not merely a right to access to a lawyer, but also to effective representation by such a lawyer.<sup>420</sup>

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<sup>415</sup> UN International Principles and Guidelines on Access to Justice for Persons with Disabilities (2020) Principle 6, para. 6.2 (j) “Repeal or amend all laws, regulations, policies, guidelines and **practices** that impose substituted decision-making in legal proceedings, including those that allow for **the appointment of decision makers against the will of persons with disabilities** (e.g. guardians ad litem, next friends and similar arrangements); **or decisions made on the basis of the “best interests” of the persons concerned, as opposed to being based on their own will and preferences”.**

<sup>416</sup> FENACERCI, [Briefing paper on barriers faced by defendants with intellectual and/or psychosocial disabilities in the Criminal Justice System in Portugal](#), Lisbon, ENABLE Project, April 2023, p.39.

<sup>417</sup> FENACERCI, [Briefing paper on barriers faced by defendants with intellectual and/or psychosocial disabilities in the Criminal Justice System in Portugal](#), Lisbon, ENABLE Project, April 2023, p.39.

<sup>418</sup> FORUM, [Briefing paper on barriers faced by defendants with intellectual and/or psychosocial disabilities in the Criminal Justice System in Czechia](#), Praha, ENABLE project, 2023, p.42.

<sup>419</sup> Plena Inclusión, [Briefing paper on barriers faced by defendants with intellectual and/or psychosocial disabilities in the Criminal Justice System in Spain](#), Madrid, ENABLE Project, 2023, p.30.

<sup>420</sup> Spanish Supreme Court Judgement 821/2016 of 2 November 2016, ECLI:ES:TS:2016:4737 available at [STS 4737/2016 - ECLI:ES:TS:2016:4737 - Poder Judicial](#).

*Practical guidance and recommendations*

1. **The right to access to a lawyer must be guaranteed and facilitated from the outset of detention through the from the pre-trial stages of legal proceedings and processes, before the first actions in criminal proceedings, and throughout the trial. To ensure effective access to legal assistance responsible State authorities should ensure that measures are in place to:**
  - A. **Afford defendants with disabilities the right to legal assistance from the first contact with law enforcement, regardless of the nature of the crime they are accused of, and on terms that are no less favourable than all other persons.**
  - B. **Guarantee that all defendants are informed of their right to have access to a lawyer and effective legal assistance.**
  - C. **Inform persons with disabilities of their right to legal aid – including, where necessary to free effective legal assistance - and other possibilities, such as access to legal representation through civil society organizations.**
  - D. **Maintain and regularly update a list of legal representatives with expertise in disability. These legal representatives should under what are the rights of persons with disabilities, including under the CRPD, and understand the obligation to provide procedural accommodations for persons with disabilities;**
  - E. **Make procedural accommodations, such as interpreters, assistive technology and intermediaries, or the resources necessary to obtain such accommodations, available to lawyers to support effective communication with persons with disabilities in the discharge of their professional duties;**

- F. **When a person is detained they must enjoy effective access to a lawyer and legal aid.**

### **Promising practice**

In Ireland, the National Advocacy Service for People with Disabilities provides communication and assistance services to persons with disabilities. They also help persons with disabilities in instructing a lawyer who represents their will and preferences. In Austria, a similar service is offered by a peer support group (BIZEPS).<sup>421</sup>

### *Systemic recommendations*

1. **The right to access to a lawyer must be guaranteed from the time of arrest to pre-trial stages of the proceeding, before the first actions in criminal proceedings, and throughout the trial. Measures should be taken to ensure that:**
  - A. **The public defence system can ensure equal access to lawyers that provide high-quality services to all defendants, including those with disabilities;**
  - B. **Legal assistance is effect and that there is a supervisory mechanism put in place by institutions charged with regulating the bar, such as bar associations and law societies. In doing so emphasis should be put on the lawyers' supportive role, being sufficiently proactive, and maintaining personal and sufficiently frequent contact with clients with disabilities.**<sup>422</sup>
2. **Legal aid must be provided for all persons with disabilities who do not have the means to afford legal assistance.**

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<sup>421</sup> E. Flynn, C. Moloney, J. Fiala-Butora, I. Vicente Echevarria, Report Access to Justice of Persons with Disabilities (2019), available at [CDLP-Finalreport-Access2JusticePWD.docx \(live.com\)](#), p. 18.

<sup>422</sup> FORUM, [Briefing paper on barriers faced by defendants with intellectual and/or psychosocial disabilities in the Criminal Justice System in Czechia](#), Praha, ENABLE project, 2023, p.75.

3. States should guarantee that initial training for lawyers on the rights of persons with disabilities is provided.
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## **D. Accessibility of court facilities, information and services**

### **International Human Rights Law and EU Law and Standards**

#### *International Human Rights Law*

Article 14.3 ICCPR provides that a person charged with a crime has a right “(b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing; [...]” and “d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing [...].”

The UN Human Rights Committee has also clarified that any distinctions to access to courts or tribunals that are not based on law and not justified on objective and reasonable grounds are prohibited.<sup>423</sup>

Article 6.3 ECHR provides that everyone charged with a crime has the right “(a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him; (b) to have adequate time and facilities for the preparation of his defence [...].”

According to article 2 CRPD: “[u]niversal design’ means the design of products, environments, programmes and services to be usable by all people, to the greatest extent possible, without the need for adaptation or specialized design” and “shall not exclude assistive devices for particular groups of persons with disabilities where this is needed.”

The CRPD Committee, the General Comment No.2, have highlighted requirements around universal design, in particular that:

“[p]ersons with disabilities and other users should be able to move in barrier-free streets, enter accessible low-floor vehicles, access information and

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<sup>423</sup> UN Human Rights Committee, General Comment No. 32. Article 14: Right to equality before courts and tribunals and to a fair trial, CCPR/C/GC/32 (2007), para. 9.

communication, and enter and move inside universally designed buildings, using technical aids and live assistance where necessary.”<sup>424</sup>

Moreover, the Committee notes that in “both urban and rural areas, access should be available for persons with disabilities to the natural and heritage parts of the physical environment that the public can enter and enjoy.”<sup>425</sup>

## **International Principles and Guidelines on Access to Justice for Persons with Disabilities**

### **Principle 2**

“**Facilities and services** must be universally accessible to ensure equal access to justice without discrimination of persons with disabilities.”<sup>426</sup>

Guideline 2.1: States must ensure that facilities and services used in legal systems are built, developed and provided on the basis of the principles of universal design to guarantee the accessibility of all facilities and services used in the justice system, including:<sup>427</sup>

(a) Enacting and implementing enforceable laws, regulations, policies, guidelines and practices that guarantee the accessibility of all facilities and services used in the justice system, based on the principles of universal design, including:

(i) Courts, police facilities, prisons, detention and forensic facilities, jury facilities, administrative offices and other such places (including toilets, cells, offices, entrances, lifts, canteens and recreational spaces in those places);

(ii) Information, communications and other services, including information and communications technology and systems;

(b) Ensuring that all means of transportation used in the justice system are accessible;

<sup>424</sup> CRPD Committee, General Comment No. 2 on Article 9: Accessibility (2014) para. 15.

<sup>425</sup> Ibid. para. 16.

<sup>426</sup> UN, Special Rapporteur on the Rights of Persons with Disability, International Principles and Guidelines on Access to Justice for Persons with Disabilities (2020), Principle 2, p 14.

<sup>427</sup> UN, Special Rapporteur on the Rights of Persons with Disability, International Principles and Guidelines on Access to Justice for Persons with Disabilities (2020), Guideline 2.1.

- (c) Ensuring that adequate financial resources are available to make the justice system physically accessible to persons with disabilities in accordance with the principles of universal design;
- (d) Guaranteeing the provision of procedural accommodations when facilities and services fail to ensure access to the existing physical environment, transportation, information and communications for persons with disabilities.<sup>428</sup>

The ECtHR addressed the issue of accessibility in the case of *Farcaș v. Romania*. In this case, the applicant was a person with a physical disability (progressive muscular dystrophy) who could not access the courts that had jurisdiction over his civil disputes. He claimed that he was not able to challenge the termination of his contract because the court building was not accessible. The ECtHR recognized that where a court is physically inaccessible to the applicant due to a disability resulting in a reduction of mobility, this inaccessibility may result in a violation of the applicant's right to access court and thus their right to a fair trial.<sup>429</sup>

Ensuring accessibility of “the physical environment, transportation, information and communication, and services open to the public” is therefore, according to the Committee, “a precondition for the effective enjoyment of various civil and political rights by persons with disabilities.”<sup>430</sup>

The European Committee of Social Rights also addressed the issue of accessibility in the case *European Disability Forum (EDF) and Inclusion Europe v. France*, Complaint No. 168/2018. In this case, the European Disability Forum and Inclusion Europe complained that France did not guarantee in practice “sufficient and effective access for persons with disabilities to social support services and facilities [...]; equal and effective access to social welfare services for persons with disabilities [...]; the right to protection against poverty and social exclusion [...]; equal and effective access to

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<sup>428</sup> Ibid. 426.

<sup>429</sup> *Farcaș v. Romania*, ECtHR, Application no. 32596/04 (2010), para. 48.

<sup>430</sup> CRPD Committee, General Comment No.2. Article 9: Accessibility, CRPD/C/GC/2 (2014) para. 27.

housing for persons with disabilities [...]; the full, complete and effective enjoyment by persons with disabilities [...] of the right to protection of health [...]"<sup>431</sup>

The European Committee of Social Rights found a violation of article 11.1 and article 16 of the European Social Charter.<sup>432</sup> The violation of article 11.1 in this case has been confirmed also as a result of the "lack of accessibility of hospital buildings and healthcare facilities (...)." <sup>433</sup>

The Committee has further held that "the shortage of support services and the lack of accessibility of buildings and facilities and public transport, cause many families to live in precarious circumstances, and thus amount to a lack of protection of the family, in violation of article 16 (The right of the family to social, legal and economic protection) of the Charter."<sup>434</sup> It stated, that: "the lack or inadequacy of the measures taken so far obliges highly dependent persons, including persons with disabilities, to live with their families, with potentially far-reaching negative implications for the family's living circumstances. [...] In this respect, the Committee takes note of the submission by the Defender of Rights that according to a 2018 survey, 88% of parents of children with disabilities in France are impacted in their job for lack of adapted measures/response to the needs of their child. Amongst those parents, 81% of mothers (compared to 16% of fathers) cease all professional activity, reduce their working time, or change profession."<sup>435</sup>

### *EU Law and Standards*

There are provisions of EU law specifically related to accessibility and the need for accurate and accessible information on the rights of persons with disabilities in

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<sup>431</sup> Ibid. para. 2.

<sup>432</sup> ECSR, *European Disability Forum (EDF) and Inclusion Europe v. France*, Complaint No. 168/2018.

<sup>433</sup> Ibid. para 288.

<sup>434</sup> Ibid. para. 310.

<sup>435</sup> Ibid. para. 309.

Directive 2012/29/EU. However, the Directive does not provide detailed guidance on specific barriers persons with disabilities face in receiving information.<sup>436</sup>

### *Challenges*

Across the EU, challenges in access to facilities and services for persons with disabilities in the administration of justice persist.

For instance, in 2019 the UN Committee on the Rights of Persons with Disabilities<sup>437</sup> expressed its concern about the lack of accessibility of law enforcement agencies and the judiciary in Spain.<sup>438</sup> The Committee also noted the absence of general procedural adjustments that take gender and age into account in judicial proceedings related to various types of disabilities, including sensory, intellectual, and physical disabilities.<sup>439</sup> Furthermore, the Committee raised concerns regarding various barriers that are the consequence of both specific laws and established practices, and that prevent persons subject to substitution decision-making regimes from participating in court proceedings on an equal footing with others.<sup>440</sup> Nonetheless, Spain has adopted legislation with the effect of gradually evolving it towards a more accessible system. On 22 December 2023, the Spanish Criminal Procedure Act established that procedural adjustments for persons with disabilities involved in judicial proceedings must be adopted whenever necessary. These adjustments include simple communications, easy-reading documents, and the institute of an intermediary.<sup>441</sup>

In Bulgaria, according to the national study, accessibility requirements are being neglected in some courts and even more so in police premises.<sup>442</sup> While by law there

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<sup>436</sup> EU Parliament and Council, Directive 2012/29/EU of the European Parliament and of the Council, L 315/57 (2012), para. 21, Article 3, Article 6.

<sup>437</sup> CRPD/C/ESP/CO/2-3 *Concluding observations on the combined 2nd and 3rd periodic reports of Spain: Committee on the Rights of Persons with Disabilities* <https://digitallibrary.un.org/record/3848691>

<sup>438</sup> Ibid. para. 24 (a).

<sup>439</sup> Ibid. para. 24 (a).

<sup>440</sup> Ibid. para. 24 (b).

<sup>441</sup> Spain Criminal Procedure Act, article 109.

<sup>442</sup> KERA Foundation, [Briefing paper on barriers faced by defendants with intellectual and/or psychosocial disabilities in the Criminal Justice System in Bulgaria](#), Veliko Tarnovo, ENABLE Project, 2023, p.10.

is a minimum standard for architectural accessibility of courtrooms and all public buildings, these requirements are frequently overlooked and unimplemented.<sup>443</sup>

In some instances, an individual's disability will prevent them from appearing before the investigating body, and provision could therefore be made for them to be questioned elsewhere.<sup>444</sup> The Bulgarian Criminal Code provides the possibility to hold court hearings outside the court when it is necessary, for example, when the defendant is in a hospital.<sup>445</sup>

### *Systemic recommendations*

1. **Responsible authorities should ensure the accessibility of all court facilities, information, communications and other services, including information and communications technology and systems in accordance with the principles of universal design. Ensure all buildings in the justice sector, such as police stations, courthouses, and prosecutorial offices, are accessible to persons with disabilities. In order to achieve this, they should:**

- A. Make adequate financial resources available so that the courts, police stations, prosecutors offices and other physical structures encountered during justice processes are physically accessible to persons with disabilities. This may require the modification of existing buildings and structures as well as a prohibition of any further new buildings or structures being created that are not compatible with the principles of universal design and therefore accessible to all persons with disabilities.

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<sup>443</sup> Ibid. 441. p.16.

<sup>444</sup> Article 120, para. 2 of Bulgarian Criminal Procedure Code.

<sup>445</sup> See Ruling No. 42 dated 23.05.2018 under criminal case (в. ч. н. д.) No. 109/2018 of the Burgas Appellate Court, not publicly available. article 262 of Criminal Code, Bulgaria. In: KERA, p.16.

- B. Guarantee the provision of reasonable and procedural accommodations when facilities and services fail to ensure access to the existing physical environment for all persons with disabilities on an equal basis.
  - C. Accessible buildings and other places should retain their accessibility after their declaration. There are cases where accessible spaces have been converted to other uses due to alleged disuse (e.g. an accessible toilet has become a storage area for cleaning supplies).
  - D. Universal design guides provide specific suggestions, which should be implemented, including ramps, rails, lifts, grooving on the ground, specific parking lots, automatic doors, etc.<sup>446</sup>
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<sup>446</sup> For specific guidance, please refer to article 2 CRPD – Definition of Universal Design, article 4.f CRPD and Principle 2 of the UN International Principles and Guidelines. See here for instance a guide for designers/engineers, which is being used in a number of universities - [PUD.pdf \(stanford.edu\)](#).

## **E. Right to be present at trial and the right to presumption of innocence**

### **International Human Rights Law and EU Law and Standards**

#### *International Human Rights Law*

Under general IHRL, including human rights treaty law, a person accused of a crime enjoys the right of presumption of innocence. This is provided for, among other places, in article 14(2) of the ICCPR and article 6(2) of the ECHR.<sup>447</sup> The right is absolute.<sup>448</sup>

The right to be present at trial is provided for in Article 14.3 of the ICCPR. This right is only waivable by the person subjective themselves.<sup>449</sup>

Article 13 of the CRPD provides that persons with disabilities must be able to access justice on an equal basis with all other people. Principle 5 of the UN International Principles explains that:

“States shall ensure that all substantive and procedural safeguards recognized in IHRL, whether in criminal, civil or administrative procedures, including the presumption of innocence and the right to remain silent, are afforded to all persons with disabilities, on an equal basis with others.”<sup>450</sup>

Practices of finding persons with disabilities “unfit to stand trial” and subjecting them instead to “security measures entailing committal or forced treatment in mental health facilities under a regime of impairment-based detention, which may be of an indefinite duration” remain widespread. Such practices result in the “abandonment of the individual’s right to the presumption of innocence and in the denial of due process safeguards that should be applicable to every person, as recognized in IHRL.”. The

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<sup>447</sup> See also article 11 of the Universal Declaration, article 40(2)(b)(i) of the Convention on the Rights of the Child,

<sup>448</sup> UN Human Rights Committee, General Comment No. 29: Article 4: Derogations during a State of Emergency, CCPR/C/21/Rev.1/Add.11 (2001).

<sup>449</sup> UN Human Rights Committee, General Comment No. 32. Article 14: Right to equality before courts and tribunals and to a fair trial, CCPR/C/GC/32 (2007), para. 36.

<sup>450</sup> UN, Special Rapporteur on the Rights of Persons with Disability, International Principles and Guidelines on Access to Justice for Persons with Disabilities (2020), Guidelines 5.1, p. 19.

CRPD Committee has accordingly called for such practices to be immediately discontinued and for laws giving effect to them to be repealed.<sup>451</sup>

### *EU Law and Standards*

Article 48 of the EU Charter guarantees the presumption of innocence.

According to Article 8 of Directive 2016/343/EU on strengthening of certain aspects of the presumption of innocence and on the right to be present at the trial in criminal proceedings, “Member States shall ensure that suspects and accused persons have the right to be present at their trial”.

A trial which can result in a decision on the guilt or innocence of a suspect or accused person can be held in their absence, only if certain requirements are met:

“(a) the suspect or accused person has been informed, in due time, of the trial and of the consequences of non-appearance. (...)”

Moreover, according to the same directive, States must ensure that suspects and accused persons are presumed innocent until proven guilty according to law.

The Directive provides general safeguards for all suspects and accused, but does not refer specifically to defendants with disabilities. As the EU is a party to the CRPD, a broad interpretation is necessary, in line with the CRPD and the jurisprudence of the Committee.

### *Challenges*

The national legislation on the right to be present at trial varies between EU Member States.

For instance, in Slovenia, the presence of the defendant is not always mandatory. The court may decide that the main hearing should be held without the presence of the

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<sup>451</sup> UN OHCHR, ‘Report - Right to access to justice under article 13 of the Convention on the Rights of Persons with Disabilities’ (December 2017), A/HRC/37/25, para. 39.

defendants if their defence counsel is present and if they have been previously interrogated.<sup>452</sup>

In Bulgaria, according to the national study, defendants with disabilities who were placed in psychiatric hospitals during their trials complained that they were not even informed of the status of their trials.<sup>453</sup>

In Romania, just as in other EU Member States, the provisions for defendants on presence in trial in criminal proceedings apply equally to persons with disabilities.<sup>454</sup> If a person is detained, it is mandatory that the defendant is present during the trial. The court proceedings may take place in the defendant's absence if, for instance, the defendant is missing, evades trial or changes their address without informing the relevant authorities. Court proceedings may also take place in the defendant's absence if the defendant provides no justification for their absence during the adjudication of the case. Throughout the court proceedings, the defendant, including when they are deprived of liberty, may apply, in writing, to be tried in absentia, represented by a public attorney or a chosen one. When the court deems it mandatory for the defendant to be present, it may order the former's presence including with a warrant.<sup>455</sup>

States face various challenges in regard to the right to presumption of innocence in respect of persons with disabilities. In Spain, there have been cases in which some behaviors exhibited by certain individuals with disabilities were considered by justice actors to be suspicious or as a lack of cooperation. For instance, a defendant's sincere lack of understanding has been frequently perceived as a lack of will to cooperate,

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<sup>452</sup> Article 307(3) ZKP.

<sup>453</sup> KERA Foundation, [Briefing paper on barriers faced by defendants with intellectual and/or psychosocial disabilities in the Criminal Justice System in Bulgaria](#), Veliko Tarnovo, ENABLE Project, 2023, p.23.

<sup>454</sup> Centre for Legal Resources, [Briefing paper on barriers faced by defendants with intellectual and/or psychosocial disabilities in the Criminal Justice System in Romania](#), Bucarest, ENABLE Project, 2023, p.18.

<sup>455</sup> Article 364 Criminal Code, Romania. See : CLR, p.18. In a recent case, a man with intellectual disability has been sentenced to one year of prison without having the possibility of being present at the trial. He was denied legal representation, tried in absentia, and summoned to the home where he did not live anymore. He has been incarcerated after having seen his right to be present at trial, as well as his right to have legal representation and to be informed violated. CLR, p. 65; CLR, ["What did the big people in the room say?". Strugurel Matei was released. – Centrul de Resurse Juridice \(crj.ro\)](#).

especially in cases involving persons with intellectual disabilities who also have problems of drug consumption.<sup>456</sup> This kind of stereotype can have an impact in terms of the presumption of innocence.<sup>457</sup>

In Bulgaria, a case is closed once the defendant with disabilities is declared “insane” or “incompetent”. The defendants are then placed in psychiatric hospitals for compulsory treatment and their stay usually extends indefinitely. In this way, persons with disabilities might be detained for compulsory treatment without a court even examining their case or the allegations against them.<sup>458</sup> When individuals are excluded from participating fully and equally in legal proceedings that affect their rights and institutionalization, these rights, including the presumption of innocence, may be violated.

### *Remote hearings*

Remote hearings may not be suitable for certain persons with disabilities, which risks violating their right to a fair trial.<sup>459</sup>

The regulation and practice of remote hearings in EU Member States vary.

In Spain,<sup>460</sup> in general, hearings and appearances before a judge must take place in person. Only in exceptional circumstances, and with certainty that the procedure meets all the guarantees, may hearings be carried out remotely. In an example cited in the national study, an online hearing was not adapted to the needs of the defendant. As a result, the defendant was not aware of who was actually in the courtroom, could not

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<sup>456</sup> Plena Inclusión, [Briefing paper on barriers faced by defendants with intellectual and/or psychosocial disabilities in the Criminal Justice System in Spain](#), Madrid, ENABLE Project, 2023, p. 49.

<sup>457</sup> Ibid. 455.

<sup>458</sup> KERA Foundation, [Briefing paper on barriers faced by defendants with intellectual and/or psychosocial disabilities in the Criminal Justice System in Bulgaria](#), Veliko Tarnovo, ENABLE Project, 2023, p. 33.

<sup>459</sup> Equality and Human Rights Commission (UK), ‘Inclusive justice: a system designed for all. Interim evidence report – Video hearings and their impact on effective participation’ (2020), available at [EHRC Inclusive justice a system designed for all \(equalityhumanrights.com\)](#), p. 8-13.

<sup>460</sup> Plena Inclusión, [Briefing paper on barriers faced by defendants with intellectual and/or psychosocial disabilities in the Criminal Justice System in Spain](#), Madrid, ENABLE Project, 2023, p. 24.

see the faces of those participating clearly, and reported that the whole situation made them feel more insecure.<sup>461</sup>

In the Czech Republic, the possibility of remote hearings is available. According to the Criminal Procedure Code, videoconferencing equipment<sup>462</sup> may be used in the performance of criminal proceedings, if it is necessary for the protection of the rights of persons, particularly with regard to their age or state of health, or if security or other compelling reasons so require. This presumably could also apply to persons with disabilities.

Where remote hearings are regulated, they do not often make specific provisions for the accommodation of persons with disabilities. This is the case in Lithuania, where the recommendations of the Judicial Council of Lithuanian Judges concerning remote hearings,<sup>463</sup> presented in 2021, do not include any reference to this service being applied in such a manner as to ensure accessibility for persons with disabilities.<sup>464</sup>

In the United Kingdom, the UK Equality and Human Rights Commission has recommended that defendants in video hearings be given information explaining their right to raise any issues they may face with the nature of such participation, and be given the means to do so. It has also recommended that justice actors consider individuals for whom video hearings would not be suitable.<sup>465</sup>

During the course of the COVID-19 pandemic, the English and Welsh courts mostly used online video platforms to conduct hearings. In this context, the UK Equality and Human Rights Commission highlighted that there was a heightened risk for persons

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<sup>461</sup> Ibid. 459. p. 28.

<sup>462</sup> The law precisely says “the technical equipment for the transmission of images and sound,” section § 52a of the Criminal Procedure Code, in: FORUM (The Czech Republic), p. 21.

<sup>463</sup> Judicial Council of Lithuanian Judges, Recommendations on remote judicial hearings/Rekomendacijos dėl nuotolinių teismo posėdžių patvirtinta Teisėjų Tarybos 2021 m. rugpjūčio 27 d. (2021) available at [rekomendacijos-del-nuotoliniu-posedziu-patvirtintos\\_skelbimui.pdf \(advokatura.lt\)](https://www.rekomendacijos-del-nuotoliniu-posedziu-patvirtintos-skelbimui.pdf).

<sup>464</sup> Mental Health Perspective, [Briefing paper on barriers faced by defendants with intellectual and/or psychosocial disabilities in the Criminal Justice System in Lithuania](#), Vilnius, ENABLE Project, April 2023, p.10.

<sup>465</sup> Equality and Human Rights Commission (UK), ‘Inclusive justice: a system designed for all. Interim evidence report – Video hearings and their impact on effective participation’ (2020), available at [EHRC Inclusive justice a system designed for all \(equalityhumanrights.com\)](https://www.equalityhumanrights.com), p. 13.

with disabilities to suffer violations of their right to a fair trial.<sup>466</sup> The Commission observed that elements like bad connections, low-quality images and sounds, and delays, could cause problems leading to such violations. In particular, persons with mental health conditions, cognitive impairments, and neuro-diverse conditions like autism and ADHD were, according to the Commission, at particular risk of not understanding or actively participating in proceedings to their detriment.<sup>467</sup> In this context, defendants might well experience problems in connecting, getting instructions, and communicating, and the identification of possible disabilities that the defendant may experience is more difficult.<sup>468</sup>

### *Practical guidance and recommendations*

- 1. Responsible authorities should take measures to ensure the right to be present at trial and to defend themselves in person, is respected for defendants with disabilities.**
  - A. Any exceptions to the right to be present at trial should not be disability-specific and should apply equally to all persons with disabilities.
  
- 2. Identify and carefully consider for whom the remote hearing might be (un)suitable.**
  - A. If using remote hearings, ensure adequate training, IT tools, and a reliable internet connection for justice actors and equally secure such access on an equal basis to persons with disabilities involved in such proceedings.

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<sup>466</sup> Ibid. p. 2.

<sup>467</sup> Ibid. p. 8-10.

<sup>468</sup> Ibid. p. 8.

- B. Respect the person's will and preferences on remote hearings. Pursue the "best interpretation of the will and preference" only when the person cannot express them directly.
- C. **Ensure access to procedural accommodations**, in remote hearings,
  - i. including where applicable, the participation of intermediaries and other support persons;
  - ii. providing that all communication support, including through third parties, (note-takers, qualified sign language and oral interpreters, relay services and tactile interpreters), is equally and effectively available to all persons with disabilities in the context of remote hearings.
- D. Ensure effective access to a lawyers/ legal aid even in the context of remote proceedings...
- E. Ensure that during a remote hearing, the role of each person taking part in the online hearing is clear, to all, including to the defendant with disability.
- F. Ensure the pace of the proceedings is well adjusted – ensure for instance rather short sessions, and frequent breaks.

*Systemic recommendations*

1. **The responsible authorities should ensure that all suspects and accused persons with disabilities effectively enjoy the presumption of innocence presumed innocent until proven guilty under the law, including at pre-trial phases.**
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## **F. Procedural rights during deprivation of liberty**

### **International Human Rights Law and EU Law and Standards**

#### *International Human Rights Law*

Article 9 of ICCPR recognizes the right to liberty and security stating that “(e)veryone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.”

In its General Comment No. 35, the Human Rights Committee clarifies the scope and meaning of article 9 of ICCPR and it adds that States should update their laws in the field of mental health to avoid arbitrary detention. In particular, the Committee observes that “(t)he existence of a disability shall not in itself justify a deprivation of liberty but rather any deprivation of liberty must be necessary and proportionate, for the purpose of protecting the individual in question from serious harm or preventing injury to others.”<sup>469</sup>

In the same General Comment, the Human Rights Committee recommends States to employ detention only as a measure of last resort, to apply it for the shortest period possible, and to adopt adequate substantive and procedural safeguards.<sup>470</sup>

The ICCPR introduces other rules on deprivation of liberty and detention conditions, setting further standards for the limitation of liberty in the field of mental health. For instance, article 7 of ICCPR introduces the prohibition of cruel, inhuman and degrading treatment, and article 10.1 of ICCPR sets a minimum standard of human treatment for people deprived of their liberty. In particular, article 10.1 provides that “(a)ll persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.”

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<sup>469</sup> UN Human Rights Committee, General Comment No. 35. Article 9 (Liberty and security of person), CCPR/C/GC/35 (2014) para. 19.

<sup>470</sup> *Ibid.* 467.

Similar standards can be observed in the CAT and especially in article 16 which prohibits inhuman and degrading treatment not amounting to torture and article 11 which requires States to “[...] keep under systematic review interrogation rules, instructions, methods and practices as well as arrangements for the custody and treatment of persons subjected to any form of arrest, detention or imprisonment in any territory under its jurisdiction, with a view to preventing any cases of torture”

Article 14 of the CRPD provides for the right to liberty and security of persons with disabilities. The CRPD Committee has stated that:

“deprivation of liberty in criminal proceedings should only apply as a matter of last resort and when other diversion programmes, including restorative justice, are insufficient to deter future crime.”<sup>471</sup>

The Committee has established that article 14 does not permit any exceptions whereby persons may be detained on the grounds of their actual or perceived impairment.<sup>472</sup>

A 2008 report by the former UN Special Rapporteur on Torture<sup>473</sup> examined the implications of the CRPD and points the way to more significant and robust protections for people with disabilities.<sup>474</sup> Other former special rapporteurs on torture have also implicitly supported this approach.<sup>475</sup> For its part, the CRPD Committee has similarly indicated that solitary confinement “should never be used on a person with disability, in particular with a psychosocial disability or if there is danger for the person’s health in general.”<sup>476</sup> Moreover, on the issue of disciplinary action and punishment, including

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<sup>471</sup> CRPD Committee, Guidelines on Article 14 of the Convention on the Rights of Persons with Disabilities, 21 (2015), para. 21. Available at <https://www.ohchr.org/EN/HRBodies/CRPD/Pages/Guidelines.aspx>.

<sup>472</sup> Ibid. para. 6.

<sup>473</sup> Special Rapporteur on torture and cruel, inhuman or degrading treatment or punishment, Report transmitted by note of the Secretary-General, U.N. Doc. A/63/175 (Jul. 28, 2008) (by Manfred Nowak).

<sup>474</sup> Special Rapporteur on torture and cruel, inhuman or degrading treatment or punishment, Report transmitted by note of the Secretary-General, U.N. Doc. A/63/175 (Jul. 28, 2008) (by Manfred Nowak). See para. 56 condemning the use of solitary confinement of persons with mental disabilities.

<sup>475</sup> Special Rapporteur on torture and cruel, inhuman or degrading treatment or punishment, Report transmitted by note of the Secretary-General, para. 78, U.N. Doc. A/66/268 (Aug. 5, 2011) (by Juan Méndez). See paras 67 and 68 condemning the use of solitary confinement of persons with mental disabilities.

<sup>476</sup> Ibid. para. 12.

solitary confinement, the Committee highlighted the need to: “prohibit the forced use of neuroleptics to contain persons with psychosocial or perceived disabilities and, in general, the use of medicine and chemical containment as a way of social control. The use of medicine as social control may amount to torture or ill treatment.”<sup>477</sup>

The Mandela Rules<sup>478</sup> provide for the prohibition of the use of solitary confinement on prisoners with physical and mental disabilities.<sup>479</sup> The Mandela Rules present other important indications on detention of persons with disabilities. For instance, Rule 5 stresses the need for reasonable accommodations in detention facilities: “(p)risons shall make all reasonable accommodation and adjustments to ensure that prisoners with physical, mental or other disabilities have full and effective access to prison life on an equitable basis.”

Rule 109 is specifically dedicated to prisoners with mental disabilities and it provides that “(p)ersons who are found to be not criminally responsible, or who are later diagnosed with severe mental disabilities and/or health conditions, for whom staying in prison would mean an exacerbation of their condition, shall not be detained in prisons, and arrangements shall be made to transfer them to mental health facilities as soon as possible.”

The Committee also noted the crucial role of prison administration in ensuring provision of reasonable accommodations:

“[p]rison administration should provide support for persons with disabilities, even though reasonable accommodation, in order for them to enjoy all the rights on an equal basis with others and secure a life free of violence. The lack of support in a prison environment can amount to torture or cruel and degrading treatment.”<sup>480</sup>

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<sup>477</sup> Ibid. para. 11.

<sup>478</sup> UN GA, GA resolution 70/175, The United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules) (2015).

<sup>479</sup> Ibid. 477. Rule 45.

<sup>480</sup> Ibid., para. 8.

Nevertheless, it is important to note that accommodations within institutions are not sufficient to ensure compliance with the CRPD. In its General Comment No. 5 on the Right to Independent Living, the CRPD Committee strongly condemns institutionalization in all its forms and indicates that deinstitutionalization is required by the right to independent living in the community, and therefore States must adopt adequate strategies to end institutionalization.<sup>481</sup> In the Guidelines on Deinstitutionalization, the CRPD Committee is even more emphatic that: “States parties should legislate to criminalize disability-based detention, institutionalization and other acts that result in disability-related torture and ill-treatment.”<sup>482</sup>

In the views in the communication *Medina Vela v. Mexico* (No. 32/2015),<sup>483</sup> the CRPD Committee found a violation of article 14.1.b CRPD that provides that the existence of a disability in no case justifies a deprivation of liberty. In this case, a temporary security measure was imposed on the applicant with an intellectual and psychosocial disability from the outset of a proceeding in which he was accused of theft. According to the forensic medical evaluation, the defendant could be a danger because his disability did not allow him to understand the unlawfulness of his actions. The measure continued after he was convicted, while the main argument used to justify the committal of the applicant was that he had a disability that required medical treatment.

The Committee also found a violation of article 14 in the communication *Mikkelsen v. Denmark* (No. 61/2019).<sup>484</sup> The applicant claimed that he had been deprived of his liberty because of a psychosocial disability and that another person without a disability would face a shorter detention if charged with the same crime.<sup>485</sup> The Committee in its findings recalled that States must “take all measures

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<sup>481</sup>CRPD Committee, General Comment No. 5. on living independently and being included in the community, CRPD/C/GC/5 (2017) para. 41, and para. 97g).

<sup>482</sup> CRPD Committee, Guidelines on deinstitutionalization, including in emergencies, CRPD/C/5, 2022, para. 120.

<sup>483</sup> Views adopted by the Committee under article 5 of the Optional Protocol concerning communication in *Medina Vela v. Mexico*, No. 32/2015, 15 October 2019, para. 10.8.

<sup>484</sup> CRPD Committee, Views adopted by the Committee under article 5 of the Optional Protocol, concerning communication No. 61/2019, UN Doc. CRPD/C/29/D/61/2019 (2023).

<sup>485</sup> *Ibid.* 2.1-3.4.

necessary, including the revision of the Mental Health Act, to ensure that persons with disabilities enjoy the right to liberty and security of person;(…)” and they also must “ensure that no one will be detained in any facility on the basis of actual or perceived disability.”<sup>486</sup>

The CRPD Committee has also recently published its findings on Hungary’s progress in the implementation of its 2017 recommendations.<sup>487</sup> The original report<sup>488</sup> on Hungary was the result of an inquiry under the Optional Protocol No. 6 to the CRPD. In this document, the Committee highlighted Hungary’s systematic violation of the rights of persons with disabilities through an abusive system of guardianship, and institutionalization. In particular, the Committee observed that persons with mental and psychosocial disabilities were more exposed to discrimination through their placement under guardianship, involuntary institutionalization and the various forms of ill-treatment and restraint that used to occur in mental health institutions.<sup>489</sup>

In the above-mentioned case *European Disability Forum (EDF) and Inclusion Europe v. France*, Complaint No. 168/2018,<sup>490</sup> the European Committee of Social Rights made reference also to the dangers of involuntary institutionalization.<sup>491</sup> The complainant organizations claimed that France did not guarantee adequate services to facilitate the independence and integration of persons with disabilities and involuntary institutionalization was employed to compensate for this lack of facilities.<sup>492</sup> The Committee considered involuntary institutionalization in relation to the obligations under Article 11 European Social Charter (right to health). Here, the Committee noted

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Ibid. 9.1-11.

<sup>487</sup> Validity Foundation, *Hungary remains responsible for “grave and systematic violations” of disability rights*, 25 November 2023, available at [Hungary remains responsible for “grave and systematic violations” of disability rights - Validity Foundation - Mental Disability Advocacy Centre - Validity Foundation - Mental Disability Advocacy Centre](#).

<sup>488</sup> CRPD Committee, Inquiry concerning Hungary under article 6 of the Optional Protocol to the Convention, CRPD/C/HUN/IR/1 (2020).

<sup>489</sup> CRPD Committee, Inquiry concerning Hungary under article 6 of the Optional Protocol to the Convention, CRPD/C/HUN/IR/1 (2020), paras 75-79.

<sup>490</sup> ECSR, *European Disability Forum (EDF) and Inclusion Europe v. France*, Complaint No. 168/2018, Decision of 19 October 2022.

<sup>491</sup> Ibid. paras 127-128.

<sup>492</sup> Ibid. paras 275-277.

that there would be no need for institutionalization if there was better provision of social services in terms of ESC as required there. In particular, the Committee highlights that inadequate support services for people with disabilities and the poor cooperation between the support services and the health service have serious consequences on people with intellectual disabilities or psychosocial disorders. It noted that: “such consequences include inappropriate and abusive psychiatric care resulting in full hospitalisation and involuntary treatments, as well as shortcomings and disruptions in the care path of persons with multiple disabilities.”.<sup>493</sup>

### *EU Law and Standards*

At the EU level, the Commission Recommendation 2013/C-378/02 on procedural safeguards for vulnerable persons suspected or accused in criminal proceedings, prescribes that EU Member States should take all steps to ensure that deprivation of liberty of vulnerable persons<sup>494</sup> before their conviction is a measure of last resort, proportionate and taking place under conditions suited to the needs of the vulnerable person. It recommends that States ensure that “vulnerable” persons have access to reasonable accommodations when deprived of liberty.<sup>495</sup>

In 2022, the Commission issued a Recommendation on procedural rights of suspects and accused persons subject to pre-trial detention and on material detention conditions.<sup>496</sup> In relation to persons with disabilities, the Recommendation prescribes that: “guidance should be provided on safeguarding the rights of persons for whom deprivation of liberty constitutes a situation of particular vulnerability, such as women,

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<sup>493</sup> Ibid. para. 277.

<sup>494</sup> According to Recital 1, The aim of the Recommendation is to encourage Member States to strengthen the procedural rights of all suspects or accused persons who are not able to understand and to effectively participate in criminal proceedings due to age, their mental or physical condition or disabilities ('vulnerable persons').

<sup>495</sup> Commission Recommendation 2013/C-378/02 on procedural safeguards for vulnerable persons suspected or accused in criminal proceedings, para. 14.

<sup>496</sup> EU Commission, Recommendation on procedural rights of suspects and accused persons subject to pre-trial detention and on material detention conditions, C(2022) 8987 final.

children, persons with disabilities or serious health conditions, LGBTIQ and foreign nationals, as well as the prevention of radicalisation in prisons.”<sup>497</sup>

The Recommendation further affirms that States should take into account the “special needs” of “persons with disabilities” in “all decisions relating to their detention”.<sup>498</sup>

There is an important reference in the Preamble of the Recommendation linking directly to the CRPD, specifically referring to reasonable accommodations and accessibility. The preamble states that:

“References in this Recommendation to appropriate measures to ensure effective access to justice for persons with disabilities should be understood in light of the rights and obligations under the United Nations Convention on the Rights of Persons with Disabilities to which the European Union and all its Member States are parties.”<sup>499</sup>

The Recommendation recalls that under EU law all forms of discrimination are prohibited, including discrimination on the basis of disability,<sup>500</sup> and provides minimum standards for material detention conditions for detainees including in respect of access to appropriate care, nutritious diet or visits from families or legal representatives. It also stresses that Member States should: “take special care to meet the needs of and ensure accessibility for detainees with disabilities or serious medical conditions with regards to material detention conditions and detention regimes.”<sup>501</sup>

The Recommendation further states, that:

“Member States should ensure that persons with disabilities or other persons with serious medical conditions receive appropriate care comparable to that provided by the national public health system which meets their specific needs. In particular, Member States should ensure that persons who are diagnosed with mental health

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<sup>497</sup> Ibid. preamble, Recital 22.

<sup>498</sup> Ibid. recital 29.

<sup>499</sup> Ibid. Preamble, Recital 34.

<sup>500</sup> Ibid. General Principles para. 13.

<sup>501</sup> Ibid. para. 76.

related medical conditions receive specialised professional care, where needed in specialised institutions or dedicated sections of the detention facility under medical supervision, and that continuity of healthcare is provided for detainees in preparation of release, where necessary.<sup>502</sup>

### *Challenges*

In Bulgaria, defendants are typically placed in psychiatric hospitals for compulsory for an indefinite period of time, which may sometimes exceed the length of imprisonment allowed for the crime they are alleged to have committed.<sup>503</sup> Such compulsory treatment is the only option for those considered by the law to be unable to stand trial. Persons with disabilities typically described such compulsory treatment and detention as the worst form of incarceration, even in comparison to prison. Persons with disabilities expressed fear of such detention and their almost complete reliance on and vulnerability to medical staff at these facilities. Compulsory treatment was also described as a “dead end” for defendants with disabilities, as many of them remain institutionalized for years due to poverty and a lack of community support and/or reintegration plans provided by the State.<sup>504</sup>

The conditions in Bulgarian prisons and psychiatric hospitals are also generally very poor and unsuitable for persons with disabilities, not even in line with their right to be treated with human dignity.<sup>505</sup>

Ultimately, in Bulgaria, poverty and the lack of community support and reintegration plans condemn persons with disabilities who have been alleged to have committed a crime to spend most of their life in compulsory treatment.<sup>506</sup>

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<sup>502</sup> Ibid. para.75.

<sup>503</sup> KERA Foundation, [Briefing paper on barriers faced by defendants with intellectual and/or psychosocial disabilities in the Criminal Justice System in Bulgaria](#), Veliko Tarnovo, ENABLE Project, 2023, p.36.

<sup>504</sup> Ibid. 502. p.29.

<sup>505</sup> Mental Health Perspectives, [Briefing paper on barriers faced by defendants with intellectual and/or psychosocial disabilities in the Criminal Justice System in Lithuania](#), Vilnius, ENABLE Project, April 2023, p.13.

<sup>506</sup> Ibid. 502. p. 27.

In Lithuania, common problems observed by legal practitioners include a lack of alternatives to imprisonment; and the lack of attention to rehabilitation and resocialization within such institutions.<sup>507</sup>

In Romania, prisons lack specific measures for people with mental disabilities and they do not satisfy procedural accommodations. For instance, only maximum security prisons guarantee special sections for people with intellectual and/or psychosocial disabilities, and access to the needed medical treatment.<sup>508</sup>

In many States like Bulgaria or Lithuania there are no alternatives to institutionalization and a defendant who the justice system determines is unable to stand in trial is usually confined in psychiatric hospitals.<sup>509</sup> In other States, such as Slovakia or the Czech Republic, there are some alternatives provided in ambulatory form or hospitalization, but they present many flaws and ultimately amount to forms of institutionalization.<sup>510</sup>

### *Practical guidance and recommendations*

**1. Detention centres must be accessible, and where necessary, support to persons with disabilities must be provided.**

#### **Promising practice**

In Spain, prisoners and ex-prisoners can benefit from the Plena Inclusion Programme that aims to offer support at all stages: during legal proceedings, in prison, and after the release.

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<sup>507</sup> Mental Health Perspective, [Briefing paper on barriers faced by defendants with intellectual and/or psychosocial disabilities in the Criminal Justice System in Lithuania](#), Vilnius, ENABLE Project, April 2023, p. 20.

<sup>508</sup> CLR, Section 3.2.2.1; Law No. 254/2013, Article 47 (Execution of custodial sentences by special categories of sentenced persons) para. 3: "The National Administration of Penitentiaries sets specific measures for the protection of the physical and mental health of persons with disabilities."; Decision of the National Administration of Penitentiaries No. 360/2020, Article 1 (h): "The profiling of places of detention under the National Administration of Penitentiaries is approved, with the following content: h) the establishment of prison units with wards for the custody of persons deprived of their liberty diagnosed with severe psychiatric disorders, as set out in Annex No 8 to this Decision."

<sup>509</sup> KERA Foundation, [Briefing paper on barriers faced by defendants with intellectual and/or psychosocial disabilities in the Criminal Justice System in Bulgaria](#), Veliko Tarnovo, ENABLE Project, 2023, p. 25; Mental Health Perspective, [Briefing paper on barriers faced by defendants with intellectual and/or psychosocial disabilities in the Criminal Justice System in Lithuania](#), Vilnius, ENABLE Project, April 2023, p. 18.

<sup>510</sup> FORUM, [Briefing paper on barriers faced by defendants with intellectual and/or psychosocial disabilities in the Criminal Justice System in Slovakia](#), Praha, ENABLE project, 2023, p. 26; FORUM, [Briefing paper on barriers faced by defendants with intellectual and/or psychosocial disabilities in the Criminal Justice System in Czechia](#), Praha, ENABLE project, 2023, p. 25.

*Systemic recommendations*

1. **Deprivation of liberty should be considered a measure of last resort.**
    - A. Community-based alternatives to incarceration should be available to all defendants, including those with disabilities.<sup>511</sup>
    - B. Alternatives to incarceration should be developed and implemented.
  2. **States must not allow for disability-based detention, institutionalization and other acts that result in disability-related torture and ill-treatment. No one should be detained in any facility on the basis of actual or perceived disability.**
  3. **States cannot use involuntary institutionalization to compensate for the lack of adequate facilities.**
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<sup>511</sup> Access to Justice Knowledge Hub, Implementing the Convention on the Rights of persons with disabilities in criminal justice systems, A briefing paper, July 2022, p. 19.

05

ANNEXES

# ANNEX I DEFINITIONS AND CONCEPTS

## A. Persons with disabilities

In terms of Article 1 of the CRPD:

“Persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others.”<sup>512</sup>

In terms of an EU Recommendation,<sup>513</sup> “persons with disabilities” should be understood in accordance with this definition provided by Article 1 CRPD.

The CRPD, in paragraph (e) of its Preamble, recognizes that disability is an evolving concept. In its General Comment No. 3, the Committee on the Rights of Persons with Disabilities (CRPD Committee) pursuant to the CRPD’s definition of disability, describes disability as “the social effect of the interaction between individual impairment and the social and material environment.”<sup>514</sup>

When identifying the needs of persons with disabilities, the individual person should always be consulted, and their agency and autonomy in considering their own needs given precedence. According to the UK Equal Treatment Bench Book: “[T]he effects of an impairment can vary for each individual. It is therefore important not to guess or assume what adjustments an individual might need.”<sup>515</sup> Without knowledge of an individual persons’ circumstances or needs, as far as possible communicated by that person – whether with or without support – it is not possible for justice actors to comply with their legal obligations to provide accommodations to ensure equal access to justice for persons with disabilities.

## B. Language

In this Bench Book, the terminology employed by the CRPD Committee is being used: “persons with disabilities” or a “person with disability.”<sup>516</sup> Neutral language should be applied over language that may carry pejorative resonance or imply impaired human

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<sup>512</sup> The UN Convention on the Rights of Persons with Disabilities (CRPD), article 1.

<sup>513</sup> EC Recommendation, Definitions, no. 8. See: [https://commission.europa.eu/system/files/2022-12/1\\_1\\_201158\\_rec\\_pro\\_det\\_en.pdf](https://commission.europa.eu/system/files/2022-12/1_1_201158_rec_pro_det_en.pdf)

<sup>514</sup> Committee on the Rights of Persons with Disabilities, ‘General Comment No. 3 (2016) on women and girls with disabilities’, CRPD/C/GC/3 (25 November 2016), para. 5.

<sup>515</sup> Judicial College (United Kingdom), ‘Equal Treatment Bench Book’ (February 2021), p. 99.

<sup>516</sup> Preferences for language to be used (people with disabilities vs disabled people) differ within between different individuals and groups in different context. Some prefer the term “disabled person.” See: Judicial College (United Kingdom), ‘Equal Treatment Bench Book’ (February 2021), p. 107.

rights agency.<sup>517</sup> For instance – a person “has” or “experiences” a disability, they do not ‘suffer from’ it. A person is not defined by their disability, as it is not the totality of their personhood, identity or existence: they are an individual “person with a disability.”

Article 2 of the CRPD defines “language” as including “spoken and signed languages and other forms of non-spoken languages”. Language (including sign languages) is explicitly distinguished from “communication” (including scripts such as Braille) in terms of the CRPD.<sup>518</sup>

### C. Equality

The CRPD Committee has indicated that Convention encompasses States to an “inclusive equality”<sup>519</sup> approach which is “a new model of equality developed throughout the Convention” which “embraces a substantive model of equality” and includes in addition to classic notions of equality:

- “(a) a fair redistributive dimension to address socioeconomic disadvantages;
- (b) a recognition dimension to combat stigma, stereotyping, prejudice and violence and to recognize the dignity of human beings and their intersectionality;
- (c) a participative dimension to reaffirm the social nature of people as members of social groups and the full recognition of humanity through inclusion in society; and
- (d) an accommodating dimension to make space for difference as a matter of human dignity. The Convention is based on inclusive equality.”<sup>520</sup>

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<sup>517</sup> Judicial College (United Kingdom), ‘Equal Treatment Bench Book’ (February 2021), p. 107-108.

<sup>518</sup> UN, Disability-Inclusive Language Guidelines (2022) available at <https://www.ungeneva.org/sites/default/files/2021-01/Disability-Inclusive-Language-Guidelines.pdf>.

<sup>519</sup> In the draft of the General Comment No.6, the Committee adopted the concept of equality suggested in the submission made by Sandra Fredman and other scholars. Fredman’s model of equality pursues four main objectives: “redressing the social and economic disadvantage associated with disability; addressing stigma, stereotyping, prejudice and violence; enhancing participation; and accommodating difference by achieving structural change.” See: Sandra Fredman, Meghan Campbell, Shreya Atrey, Jason Brickhill, Nomfundo Ramalekana, Sanya Samtani, Achieving Transformative Equality for Persons with Disabilities: Submission to the CRPD Committee for General Comment No.6 on Article 5 of the UN Convention on the Rights of Persons with Disabilities, available at [CPRD-Submission-1.pdf \(ox.ac.uk\)](https://www.ox.ac.uk/cprd-submission-1.pdf).

<sup>520</sup> Committee on the Rights of Persons with Disabilities, General Comment No. 6 on equality and non-discrimination, CRPD/C/GC/6 (2018) para. 11.

#### D. Discrimination

Article 5(2) of the CRPD provides that “States Parties shall prohibit all discrimination on the basis of disability and guarantee to persons with disabilities equal and effective legal protection against discrimination on all grounds.” In addition, “(i)n order to promote equality and eliminate discrimination, States Parties shall take all appropriate steps to ensure that reasonable accommodation is provided.”<sup>521</sup>

Moreover, Article 2 of the CRPD defines discrimination on the basis of disability as:

“(...) any distinction, exclusion or restriction on the basis of disability which has the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise, on an equal basis with others, of all human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field. It includes all forms of discrimination, including denial of reasonable accommodation; (...)”

Persons with disabilities may also experience intersectional discrimination which occurs:

“(...) when a person with a disability or associated to disability suffers discrimination of any form on the basis of disability, combined with, colour, sex, language, religion, ethnic, gender or other status.”<sup>522</sup>

Prohibited grounds of discrimination in international human rights law and criminal law, non-exhaustively include:

“age; sex; sex characteristics; gender; sexual orientation; gender identity; gender expression; race; colour; national or social origin; nationality/citizenship; ethnicity; disability; immigration status; property; birth or descent, including on the basis of caste and analogous systems of inherited status; language; religion or belief; political or other opinion; membership of a particular social group; marital or family

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<sup>521</sup> CRPD, article 5.3.

<sup>522</sup> CRPD Committee, General Comment No. 6 on Equality and Non-discrimination (2018) CRPD/C/GC/6\*, para. 19.

status; pregnancy; childbirth; parenthood; health status, including HIV status or drug dependence; economic and social status; occupational status; place of residence; indigenous identity or status; minority or other status.”<sup>523</sup>

#### E. Accessibility

Uniquely among international human rights treaties, the CPRD contains self-standing obligations<sup>524</sup> for States to ensure accessibility, including of public and private services, facilities, information and means of communication to persons with disabilities.<sup>525</sup> Irrespective of whether an individual needs or seeks procedural or reasonable accommodations, States must proactively take measures to ensure that all facilities, infrastructure, communication platforms and information provided in the justice system are fully accessible to persons with disabilities on an equal basis.<sup>526</sup> Accessibility (article 9) therefore includes a separate and additional obligation on States in respect of accommodations, including in the context of access to justice, additional to the obligation to provide reasonable (article 5) and procedural (article 13) accommodations.

The CRPD Committee has specified in its General Comment No. 2 (2014) on accessibility that States must ensure the accessibility of, among others, “the physical environment, transportation, information and communication, and services”. These obligations apply to all “goods, products and services open or provided to the public” regardless of “whether they are owned and/or provided by a public authority or a private

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<sup>523</sup> Ibid.; see also Committee on Economic, Social, and Cultural Rights, General Comment No. 20. Non-discrimination in economic, social and cultural rights (art. 2, para. 2, of the International Covenant on Economic, Social and Cultural Rights), E/C.12/GC/20 (2009), para. 15.

<sup>524</sup> Whether Article 9 creates a new right or articulates an existing aspect of all rights is a matter of some scholarly debate. For our purposes it is sufficient that Article 9, as interpreted by the CRPD Committee, clearly places legally binding obligations on States in ensuring accessibility generally and in the specific context of justice processes, procedures and systems.

<sup>525</sup> Ibid.

<sup>526</sup> Article 9 CRPD: “To enable persons with disabilities to live independently and participate fully in all aspects of life, States Parties shall take appropriate measures to ensure to persons with disabilities access, on an equal basis with others, to the physical environment, to transportation, to information and communications, including information and communications technologies and systems, and to other facilities and services open or provided to the public, both in urban and in rural areas. [...]”

enterprise.” Denial of access on an equal basis amount to discrimination whether perpetrated by State or non-State actors.<sup>527</sup>

#### F. Procedural Accommodations

Procedural accommodations refer to all necessary and appropriate “modifications and adjustments in the context of access to justice, where needed in a particular case, to ensure the participation of persons with disabilities on an equal basis with others.”<sup>528</sup>

Most of the measures described in this Bench Book required to eliminate barriers to access to justice faced by persons with disabilities in justice processes and procedures amount to “procedural accommodations.”

Although the obligation to provide procedural accommodations (Article 13) overlaps significantly with the obligation to provide “reasonable accommodations” (Article 5) it also differs in an important respect. Unlike the obligation to provide reasonable accommodations, the immediate obligation to provide any and all procedural accommodations needed by persons with disabilities to participate in justice systems is not subject to any limitation or restriction based on the provision by the State claiming or providing an “undue burden”. This means, for example, that a shortage of human, financial or other resources should be invoked by the State as a justification for the failure to provide procedural accommodations to ensure equal access to justice for persons with disabilities.<sup>529</sup>

Article 13 CRPD provides that States must “ensure effective access to justice for persons with disabilities on an equal basis with others, including through the provision

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<sup>527</sup> Committee on the Rights of Persons with Disabilities has specified in its General Comment No. 2 (2014) on accessibility (CRPD/C/11/3), para. 10.

<sup>528</sup> [https://www.ohchr.org/sites/default/files/Documents/Issues/Disability/SR\\_Disability/GoodPractices/Access-to-Justice-EN.pdf](https://www.ohchr.org/sites/default/files/Documents/Issues/Disability/SR_Disability/GoodPractices/Access-to-Justice-EN.pdf), p. 9.

<sup>529</sup> Procedural accommodations are distinguishable from reasonable accommodation in that procedural accommodations are not subjected to a proportionality test and they have a dual character: one is that of systemic realization in terms of transforming judicial systems to be accessible for and inclusive of persons with disabilities, and another that provides for the immediate provision of accommodation in legal proceedings in order to avoid that the right to access to justice becomes void in a particular situation. (GC Article 5, para 58), International Principles and Guidelines on Access to Justice for Persons with Disabilities (2020), p. 9.

of procedural and age-appropriate accommodations.” States are required to “facilitate their effective role as direct and indirect participants, including as witnesses, in all legal proceedings, including at investigative and other preliminary stages.”<sup>530</sup>

The UN Special Rapporteur on the Rights of Persons with Disabilities’ *International Principles* define procedural accommodations as including:

“all necessary and appropriate modifications and adjustments in the context of access to justice, where needed in a particular case, to ensure the participation of persons with disabilities on an equal basis with others.”

#### G. Reasonable Accommodations

Article 2 of the CRPD, defines “reasonable accommodation” as the:

“necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms.”

“Denial of reasonable accommodation” constitutes discrimination in terms of the Convention.

It is important to note that States’ obligations in terms of accessibility (see above) are separate from and additional to their obligations in respect to reasonable accommodations. The CRPD Committee distinguishes between accessibility and reasonable accommodation obligations in the following manner:

“(R)easonable accommodation duties are different from accessibility duties. Both aim to guarantee accessibility, but the duty to provide accessibility through universal design or assistive technologies is an ex ante duty, whereas the duty to provide reasonable accommodation is an ex nunc duty:

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<sup>530</sup> CRPD, Article 13.

- A. As an ex-ante duty, accessibility must be built into systems and processes without regard to the need of a particular person with a disability, for example, to have access to a building, a service or a product, on an equal basis with others. States parties must set accessibility standards that are developed and adopted in consultation with organizations of persons with disabilities, consistent with article 4(3) of the Convention. The duty of accessibility is a proactive, systemic duty;
- B. As an ex nunc duty, reasonable accommodation must be provided from the moment that a person with a disability requires access to non-accessible situations or environments, or wants to exercise his or her rights. Reasonable accommodation is often but not necessarily requested by the person who requires access, or by relevant representatives of a person or a group of people. Reasonable accommodation must be negotiated with the applicant(s). (...).<sup>531</sup>

The duty on justice actors to provide reasonable accommodations in specific situations is therefore additional to, for example, the States' obligations to ensure accessibility. For example, while a failure to ensure that a courtroom or building is accessible for a wheelchair user might contravene the accessibility obligation and be beyond the power of a single prosecutor, that prosecutor will have the responsibility in each specific circumstance to accommodate wheelchair users.<sup>532</sup>

The obligation to provide reasonable accommodations includes both positive obligations to make modifications and adjustments to ensure equality and a duty to ensure that such accommodations do not impose an undue burden on justice actors.<sup>533</sup>

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<sup>531</sup> Committee on the Rights of Persons with Disabilities, General Comment No. 6 (2018) on equality and non-discrimination' (2018) UN Doc. CRPD/C/GC/6, para. 25. General comment No. 2, Article 9: Accessibility (2014), UN Doc. CRPD/C/GC/2 para. 24

<sup>532</sup> Committee on the Rights of Persons with Disabilities, General Comment No.2, Article 9: Accessibility (2014), UN Doc. CRPD/C/GC/2, para. 25-26.

<sup>533</sup> Committee on the Rights of Persons with Disabilities, General Comment No. 6 (2018) on equality and non-discrimination' (2018), UN. Doc. CRPD/C/GC/6, para. 25.

According to the CRPD Committee, while what is “reasonable” may vary, it should not be determined solely with reference to resources available. The determination of reasonableness is therefore about the “relevance, appropriateness and effectiveness” of a proposed accommodation for a person with a disability and whether it achieves its purpose.<sup>534</sup>

The CRPD Committee has emphasized that “dialogue with the person with a disability concerned” should “guide the implementation” of the duty to provide reasonable accommodations.<sup>535</sup> In addition, since the objective is to support a person with a disability in enjoying equal rights, the “burden of proof rests with the duty bearer who claims that their burden would be disproportionate or undue” and it is important to ensure that “persons with a disability [...] do not bear the costs” of accommodations.<sup>536</sup> In determining whether a burden is undue, the financial resources available should be considered but so should the benefits to the individual being accommodated and to other similarly placed individuals in the future.<sup>537</sup>

#### H. Special measures

“Reasonable accommodation” should not be confused with “specific measures” sometimes also called “special measures” or “temporary special measures” in IHRL, and including what are often described as “affirmative action measures” in some domestic jurisdictions.<sup>538</sup> As the CRPD Committee stated:

“While both concepts aim at achieving de facto equality, reasonable accommodation is a non-discrimination duty, whereas specific measures imply a preferential treatment of persons with disabilities over others to address historic and/or systematic/systemic exclusion from the benefits of exercising rights.

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<sup>534</sup> Ibid. para. 25 a).

<sup>535</sup> Ibid. para. 26 a).

<sup>536</sup> Ibid. para. 26 f), g).

<sup>537</sup> Ibid. para. 26 d), e).

<sup>538</sup> Ibid. para. 25c.

Examples of specific measures include temporary measures for countering the low numbers of women with disabilities employed in the private sector and support programmes to increase the number of students with disabilities in tertiary education.”<sup>539</sup>

#### I. The social, human rights and medical models of disability

In terms of the medical model of disability, focus is placed on the person’s condition, which is understood to directly cause their disability.<sup>540</sup> The CRPD Committee has explained that “[u]nder the medical model of disability, persons with disabilities are not recognized as rights holders but are instead ‘reduced’ to their impairments.”<sup>541</sup> Earlier international standards relating to disability were based on such a medical model of disability, including the Declaration on the Rights of Mentally Retarded Persons (1971) and the Declaration on the Rights of Disabled Persons (1975)<sup>542</sup>. The CRPD Committee represents a decisive departure from this approach to and understanding of disability.

The social model of disability, on the other hand, places focus on the barriers created by society and the interaction of such barriers with each individual person with a disability. It acknowledges that social, attitudinal, legal and other barriers frequently prevent individuals with disabilities from enjoying human rights on an equal basis.<sup>543</sup> The Office of the High Commissioner for Human Rights (OHCHR) has explained the social model of disability in the following terms:

“disability is not a “mistake” of society but an element of its diversity. Disability is a social construct—the result of the interaction in society between personal factors and environmental factors. Disability is not an individual problem but the outcome

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<sup>539</sup> CRPD, General Comment No 6, para 25c

<sup>540</sup> European Parliamentary Research Service, ‘Understanding EU policies for persons with disabilities’ (November 2021), p. 2.

<sup>541</sup> Committee on the Rights of Persons with Disabilities, ‘General Comment No. 6 (2018) on equality and non-discrimination’, CRPD/C/GC/6 (26 April 2018), para. 8.

<sup>542</sup> Ibid. 540.

<sup>543</sup> European Parliamentary Research Service, ‘Understanding EU policies for persons with disabilities’ (November 2021), p. 2.

of a wrong organization of society. As a consequence, society should restructure policies, practices, attitudes, environmental accessibility, legal provisions and political organizations and therefore dismantle the social and economic barriers that prevent full participation of persons with disabilities.”<sup>544</sup>

The CRPD reflects a social model of disability,<sup>545</sup> amounting to what the CRPD Committee describes as a human rights model of disability,<sup>546</sup> and explains in its General Comment No. 6 as follows:

“The human rights model of disability recognizes that disability is a social construct and impairments must not be taken as a legitimate ground for the denial or restriction of human rights. It acknowledges that disability is one of several layers of identity. Hence, disability laws and policies must take the diversity of persons with disabilities into account. It also recognizes that human rights are interdependent, interrelated and indivisible.”<sup>547</sup>

The human rights model of disability is focused on “the inherent dignity of the human being and subsequently, but only if necessary, on the person’s medical characteristics”. Therefore, importantly, it places the individual person with a disability “at centre stage in all decisions affecting them and, most importantly, locates the main ‘problem’ outside the person and in society.”<sup>548</sup> This model therefore recognizes that protection of human rights for an individual person with a disability “does not require the absence of impairment.”<sup>549</sup>

## J. Legal capacity

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<sup>544</sup> UN OHCHR, ‘The Convention on the Rights of Persons with Disabilities – Training Guide No. 19’ (2014), p. 10.

<sup>545</sup> *Ibid.* p. 25.

<sup>546</sup> Committee on the Rights of Persons with Disabilities, ‘General Comment No. 7 (2018) on the participation of persons with disabilities, including children with disabilities, through their representative organizations, in the implementation and monitoring of the Convention’, CRPD/C/GC/7 (9 November 2018), para 1.

<sup>547</sup> Committee on the Rights of Persons with Disabilities, ‘General Comment No. 6 (2018) on equality and non-discrimination’, CRPD/C/GC/6 (26 April 2018), para. 9.

<sup>548</sup> Gerard Quinn and Theresia Degener, *Human Rights and Disability* (2002), p. 14, cited in Theresia Degener, ‘A Human Rights Model of Disability’ in *Routledge Handbook of Disability Law and Human Rights* (July 2016).

<sup>549</sup> Theresia Degener, ‘A Human Rights Model of Disability’ in *Routledge Handbook of Disability Law and Human Rights* (July 2016).

Article 12 CRPD provides that “persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life.” States must “take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity.”<sup>547</sup>

In its General Comment No.1, the CRPD Committee affirms that:

“Legal capacity includes the capacity to be both a holder of rights and an actor under the law. Legal capacity to be a holder of rights entitles a person to full protection of his or her rights by the legal system. Legal capacity to act under the law recognizes that person as an agent with the power to engage in transactions and create, modify or end legal relationships.”<sup>548</sup>

The International Principles<sup>549</sup> define legal capacity as:

“the capacity to be both a holder of rights and an actor under the law. Legal capacity to be a holder of rights entitles persons to full protection of their rights by the legal system. Legal capacity to act under the law recognizes that person as an agent with the power to engage in transactions and create, modify or end legal relationships.”<sup>550</sup>

*Note: please see more details in the section on legal capacity.*

#### K. Communication

Article 2 of the CRPD defines communication as including:

“languages, display of text, Braille, tactile communication, large print, accessible multimedia as well as written, audio, plain-language, human-reader and augmentative and alternative modes, means and formats of communication, including accessible information and communication technology.”

#### L. Deinstitutionalization

Institutionalization is a set of discriminatory practices which the CRPD Committee has indicated per se violate a range of rights of persons with disabilities.<sup>550</sup>

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<sup>550</sup> CRPD, Guidelines on deinstitutionalization, including in emergencies, 10 October 2022, para. 6.

The CRPD Committee's *Guidelines on deinstitutionalization* do not define deinstitutionalization but explain what institutionalization is and provide examples, such as:

- de facto denial of the legal capacity of persons with disabilities, in breach of article 12;
- detention and deprivation of liberty based on impairment, contrary to article 14;
- exposure of persons with disabilities to forced medical intervention with psychotropic medications, such as sedatives, mood stabilizers, electroconvulsive treatment, and conversion therapy, infringing articles 15, 16 and 17;
- exposure of persons with disabilities to the administration of drugs and other interventions without their free, prior and informed consent, in violation of articles 15 and 25.<sup>551</sup>

#### M. Supported Decision-Making

**Substituted decision-making** is a model entrenched in many legal systems and laws, which serves to deprive persons with disabilities of the right to make decisions for themselves, and, instead delegates the right to others to make decisions on behalf of persons with disabilities.<sup>552</sup> Those tasked with substituting the decision-making of a person with a disability maybe appointed through a formal legal process, such as when someone is appointed to be a “guardian” by law, or through informal means, such as when family members or practitioners automatically and systematically take over all decision-making.<sup>553</sup> Substituted decision making, despite its ongoing prevalence in practice across the world, is in direct contravention of the CRPD and in violation of the autonomy and legal capacity of persons with disabilities.

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<sup>551</sup> Ibid., para. 6.

<sup>552</sup> World Health Organization, “Supported decision-making and advance planning: WHO QualityRights Specialized training,” 1 January 2019, accessible [here](#).

<sup>553</sup> Ibid.

**Supported decision-making** is a model that the CRPD requires States to adopt, by which persons with disabilities are provided with a range of support options, including the support of people they trust (family, friends, peers, advocates, lawyers, interpreters, intermediaries), in order to support and enhance their ability to make decisions for themselves.<sup>554</sup> Under Article 12 of the CRPD, States must take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity.<sup>555</sup> Supported decision making does not imply the practice of those providing support will seek to establish a person with a disability's "best interests" for them. Instead, the central aim of supported decision-making is ensuring support to enable autonomous decision-making and the expression of the will and preferences of an individual with a disability.

#### N. Intermediaries

Intermediaries (also known as facilitators) are defined by the International principles<sup>556</sup> as "(...)persons who work, as required, with justice system personnel and persons with disabilities to ensure effective communication during legal proceedings."<sup>557</sup> Such intermediaries may "support persons with disabilities to understand and make informed choices, making sure that things are explained and talked about in ways that they can understand and that appropriate accommodations and support are provided."<sup>558</sup>

*See more details in [section IV.1.3.](#) below.*

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<sup>554</sup> Ibid.

<sup>555</sup> Status of the Convention on the Rights of Persons with Disabilities (2006), accessible [here](#)

<sup>556</sup> UN, Special Rapporteur on the Rights of Persons with Disability, International Principles and Guidelines on Access to Justice for Persons with Disabilities (2020).

<sup>557</sup> UN, Special Rapporteur on the Rights of Persons with Disability, International Principles and Guidelines on Access to Justice for Persons with Disability, Glossary.

<sup>558</sup> Ibid.

**ANNEX II EXAMPLES OF  
DISABILITIES THAT  
MIGHT REQUIRE  
PROCEDURAL  
~~ADJUSTEMENT~~**

The CRPD itself describes disability as an “evolving concept” and indicates that, among others persons with disabilities include “those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others.”<sup>559</sup>

The current annex provides a list of impairments that may constitute a disability in a specific case and specific context. It should not be read as exclusive nor prescriptive list of disabilities. It is rather intended to provide general information about some disabilities, and it can constitute a useful tool for justice actors to ensure the effective participation of individuals with disabilities in proceedings.

A contextual analysis and evaluation needs to be done in each and every individual case in order to consider whether specific adjustments, procedural or other accommodations are needed in each specific case.

- Acquired Brain Injury

The term Acquired Brain Injury (ABI) refers to any damage to the brain that occurs after birth. ABI may be caused by various circumstances (e.g., accident, stroke, tumours, or disorders such as Parkinson’s disease). Acquired Brain Injury may lead to changes in physical and sensory abilities, or to changes in the ability to think and learn (e.g., memory loss, lack of concentration, difficulty with abstract thinking). It may also cause changes in behaviour and personality (e.g., lack of motivation, mood swings, feeling flat or depressed, impulsive or uninhibited behaviour). Finally, ABI may create communication difficulties (e.g., slow or slurred speech, difficulty following conversations) and medical difficulties (e.g., epilepsy, seizure).<sup>560</sup>

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<sup>559</sup> CRPD, Preamble, (e).

<sup>560</sup> Disability Access Bench Book, Judicial College Victoria, Australia, 2023. Section 7.2. See: <https://resources.judicialcollege.vic.edu.au/article/1053839/section/843558>

Some reasonable adjustments should be made to assist persons with ABI who have difficulties in communication. Examples of these adjustments are the use of technologies, the use of clear and concise language, the repetition of some indications and concepts, and the allowance of extra time to answer.<sup>561</sup> During the hearing, other useful adjustments are regular breaks, late start times, shortened days, and a quiet environment.<sup>562</sup>

- Agoraphobia

Agoraphobia is a phobia that usually consists of the fear of traveling away from a person's safe space -e.g., home- or of being trapped somewhere. This phobia can manifest in various ways and with varying severity. A person with agoraphobia might fear being distant from home but also being in unfamiliar routes and places, in wide open spaces, in crowded places, in confined spaces -e.g., trains or lifts-. Sometimes people might also fear standing in long lines or being left alone. When persons with agoraphobia are in the feared places, they might experience a panic attack. These persons might also become anxious even thinking about going to these places and tend to avoid them.<sup>563</sup>

Possible adjustments for the hearing include choosing a location for the venue in a place close to the person's house and on the ground floor, taking evidence in written form or through electronic means, limiting the number of persons in the courtroom, and allowing the defendant to sit next to the door, having a companion, and taking breaks when needed.<sup>564</sup>

- Albinism

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<sup>561</sup> Ibid. Section 7.2.

<sup>562</sup> Equal Treatment Bench Book, UK, July 2024. See: <https://www.judiciary.uk/about-the-judiciary/diversity/equal-treatment-bench-book/> 247.

<sup>563</sup> Ibid. 249.

<sup>564</sup> Ibid. 249.

Albinism is a rare inherited condition that consists of a reduced amount of melanin or a lack of melanin. People with albinism usually present very pale skin, hair, and eyes, but this might vary according to the type of albinism, the amount of melanin produced by the person's body, and the usual pigmentation of the ethnic group to which the person belongs. Ocular albinism affects only the eyes and oculocutaneous albinism affects only skin and hair. Albinism can cause eye problems that cannot be corrected with glasses, sensitivity to light (photophobia), and nystagmus. Nystagmus consists of a person's eyes moving involuntarily from side to side or up and down or around.<sup>565</sup>

Reasonable adjustments for people with albinism might be adjustments with lighting and avoidance of video hearings if the computer screen creates difficulties. Moreover, these persons should be allowed to wear dark glasses or caps and there should be no assumptions because of lack of eye contact or the movement of the eyes. Frequent breaks and consulting the interested person about the room lay might also be useful practices.<sup>566</sup>

- Arm, hand, or shoulder impairment

Arm, hand, and shoulder impairments are very common, and they can be caused by Arthritis, frozen shoulder, injury, and repetitive strain injury (RSI). RSI is a general term that refers to a range of painful conditions affecting the musculoskeletal system. Persons with arm, hand, and shoulder impairment might experience pain, loss of grip, loss of movement, muscle weakness, spasms, numbness, sensation of cold, burning sensation, pins, and needles.<sup>567</sup>

Possible reasonable adjustments include suitable chairs, regular breaks, shorter days, assistance with swearing the oath, opening doors, pouring water, manoeuvring hearing

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<sup>565</sup> Ibid. 253.

<sup>566</sup> Ibid. 253.

<sup>567</sup> Ibid. 250.

bundles, and turning pages. The person should also be allowed to sit in a comfortable position without twisting.<sup>568</sup>

- Arthritis

Arthritis is a condition that affects people of all ages and presents various forms (e.g., osteoarthritis, rheumatoid arthritis, lupus, gout, ankylosing spondylitis). Persons with arthritis might face difficulties in standing, walking, sitting, and in many daily tasks that require movements.<sup>569</sup>

During the trial, these persons might need assistance with manoeuvring trial bundles or pouring water. In case they have difficulties with movements, they should not be required to stand when the judge enters the room. In case of swearing the witness, the person should not be asked to take hold of the oath card or religious books.<sup>570</sup>

- Attention Deficiency Hyperactivity Disorder (ADHD)

Attention Deficiency Hyperactivity Disorder (ADHD) is a disorder characterized by inattentiveness, impulsiveness, and hyperactivity that show up from the age of seven years and it might continue in adulthood. This disorder might affect a trial because the person might struggle to focus and listen to the judge.<sup>571</sup>

For this reason, reasonable accommodations can consist of giving management instructions or orders one at a time, not asking for over-complex particulars or schedules, and writing down what actions need to be taken. Moreover, breaks, summing up the current stage of the process, or using short sentences can be useful. Finally, these persons should be allowed to provide written answers to written

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<sup>568</sup> Ibid. 250.

<sup>569</sup> Ibid. 251.

<sup>570</sup> Ibid. 251.

<sup>571</sup> Ibid. 251.

questions and to have the hearing in a room with minimal outside noises and reduced distractions.<sup>572</sup>

- Autism spectrum disorder

Autism spectrum disorder (ASD) is a lifelong developmental disability, and it affects the relationships and interactions of the person with the environment and other people. ASD is a spectrum condition so people can experience it in very different ways. For instance, not all persons with ASD have some degree of intellectual disability. People with ASD may experience delayed or impaired language comprehension and expression. They may also have difficulties using and understanding the social context of language and impaired social skills. For example, they may interpret words literally, avoid eye contact, or have difficulties understanding their own or other people's emotions. Some persons with ASD may also have repetitive, ritualistic, or unusual behaviours, and they may be sensitive to sounds, touch, light, or other sensory perceptions.<sup>573</sup>

In these cases, reasonable adjustments include the use of clear, concise and plain language, a calm voice tone, extra time to answer and avoidance of sarcasm, and too many gestures or distractions. The questions should be precise and direct, and the judge should start the questions with the person's name to avoid misunderstandings. The judge should also be careful to not consider avoiding eye contact or other behaviours as lack of respect.<sup>574</sup> Other possible adjustments are clear explanations about the procedural stages, circulation of written indications, schedules, and chronologies of deadlines, allowance of regular breaks, and patience. The courtroom should be quiet and with low lights, and the person should be allowed to choose where to seat.<sup>575</sup>

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<sup>572</sup> Ibid. 252.

<sup>573</sup> Disability Access Bench Book, Australia, Section 7.3.

<sup>574</sup> Ibid. Section 7.3.

<sup>575</sup> Equal Treatment Bench Book, UK, 255.

- Back Impairment

Back pain is widespread, and its severity and duration might vary. The hearing might require some adjustments depending on the severity of the problem. For instance, the defendants might need a suitable chair, regular breaks, or assistance with manoeuvring hearing bundles and pouring water. These persons might also be allowed to stand up and walk around or sit in a specific position to avoid twisting while talking with the judge and advocates.<sup>576</sup>

- Blindness and Visual Impairment/Low vision

Blindness is a complete, or almost complete, loss of vision and it affects the person's ability to see. While some people may perceive light, shadows, and/or shapes, other persons see nothing at all. Colour Blindness is an inability to distinguish between colours. Some persons do not distinguish between red and green; others see everything in black, white, and grey. Visual Impairment/Low Vision is a partial loss of vision that cannot be corrected through glasses.<sup>577</sup>

Reasonable accommodations include ensuring documents are in accessible formats (e.g., Braille), requiring general support and guidance from the support staff when this is needed, making necessary physical adjustments in the courtroom, allowing support persons to be present, and guaranteeing access to the assistance dog. The persons should also be allowed to familiarise themselves with the physical environment, and they should not be asked to recall information or events based on their vision. Finally, promising practices for judges and legal professionals are announcing themselves before speaking and asking the defendants about their specific needs.<sup>578</sup>

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<sup>576</sup> Ibid. 259.

<sup>577</sup> Disability Access Bench Book, Australia, Section 7.4.

<sup>578</sup> Ibid. Section 7.4.

- Cancer

There are many different kinds of cancers that have various effects and need different treatments. Treatments (e.g., surgery, radiation therapy or chemotherapy, stem cell or bone marrow transplant, hormone therapy) have various side effects like nausea, anaemia, vomiting, pain, insomnia, and mood change. Long-term medications can have both physical and psychological challenges. Moreover, persons might experience “cancer fatigue” which is characterized by tiredness and inability to function because of a lack of energy. Cancer fatigue might originate from the cancer itself or from the treatment and it can be acute or chronic. Persons with cancer might also have problems because of a weakened immune system and the need to attend numerous medical appointments for treatments.<sup>579</sup>

In the case of a defendant with cancer, remote hearings can help to avoid the need for travel or unnecessary exposure to infections. Moreover, the persons should be allowed to attend medical treatments and to have the necessary time to get the required medical certificate in relation to practical issues. A promising practice is also to ask in advance to the defendants if they need particular adjustments during the hearings (e.g., water or other drink supplements, a pillow, chair with arm supplies, possibility to change position from time to time, arrangements in case of vomit) or if they prefer remote hearings.<sup>580</sup>

- Cerebral palsy

Cerebral Palsy is a group of disorders affecting a person’s ability to move including muscle control, coordination, tone, posture, and balance. It is usually the result of one or more non-progressive abnormalities in the brain happening before the growth and development are complete. It can be caused by insufficient oxygen getting to the brain

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<sup>579</sup> Equal Treatment Bench Book, UK, 260-261.

<sup>580</sup> Ibid.

at birth, toxins, or genetic factors. Language therapists or someone familiar with the speech patterns of the individual can be helpful to communicate. Some persons also use communication aids like speech synthesizers or word boards.<sup>581</sup>

Reasonable accommodations are guaranteeing physical access to the courtroom, the toilet, and all the tribunal's facilities, and allowing the use of communication aids and devices in case cerebral palsy affects communication abilities. Promising practices also include organizing frequent breaks, allowing support persons to participate, and discussing with the defendants their needs.<sup>582</sup>

- Cerebral Vascular Accident (CVA) - Stroke

Cerebral Vascular Accident (CVA) is caused by a clot or hemorrhage in an area of the brain. CVA can lead to weakness or paralysis of an arm, leg, or one side of the body, but also to twisting of the face, loss of balance, disturbance of vision, problems in speech, difficulties in understanding, and loss of control of the bladder or bowels. The recovery from a stroke can vary a lot from individual to individual.<sup>583</sup>

The adjustments required depend on the problem that the person presents. There might be a need for adjustments of the communication style, presence of a carer, help with interpretation, or use of Makaton signs and symbols to communicate.<sup>584</sup>

- Chronic Obstructive Pulmonary Disease (COPD)

Chronic Obstructive Pulmonary Disease (COPD) is a general term to refer to chronic bronchitis, emphysema, or both. COPD is progressive and non-reversible, and its symptoms are cough, wheeze, and breathlessness. Persons with COPD might need

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<sup>581</sup> Ibid. 263.

<sup>582</sup> Ibid. 264.

<sup>583</sup> Ibid. 264.

<sup>584</sup> Ibid. 264.

inhalers or portable oxygen in the most severe cases. The inhalers take some time to work, and they can cause palpitations and dizziness.<sup>585</sup>

Reasonable accommodations might include frequent breaks or a slower pace during cross-examinations.<sup>586</sup>

- Deafness and hearing loss

Deafness is the complete or almost incomplete inability to hear. Deaf people communicate in various ways. Some persons within the deaf community do not consider deafness as a disability but regard themselves as a cultural and linguistic minority group.<sup>587</sup>

Possible reasonable accommodations are providing interpreters of the sign language, allowing the presence of a support person, facing the deaf persons, keeping eye contact, and giving the needed time to answer.<sup>588</sup> Other possible promising practices involve choosing a quiet room with good lighting, allowing the use of induction loop, or writing information and indications. When the judge and the other professionals in the court speak, they should not shout or exaggerate with hand gestures or facial expressions, but they should speak in a steady rhythm, make a little pause after every sentence to allow the translation, look at the deaf person, and use full sentences. It is important to remember that there is no universal sign language, but there are many national sign languages. For this reason, being aware of the language spoken by the person is important.<sup>589</sup>

- Deafblindness

Deafblindness consists of a loss of vision and hearing. Deafblindness varies from person to person. For instance, some persons may be fully blind and hard of hearing,

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<sup>585</sup> Ibid. 264.

<sup>586</sup> Ibid. 265.

<sup>587</sup> Disability Access Bench Book, Australia, Section 7.6.

<sup>588</sup> Ibid. Section 7.6.

<sup>589</sup> Equal Treatment Bench Book, UK, 277-278.

and other individuals may be deaf with some sight. Some people may also experience of complete or nearly complete loss of both sights.<sup>590</sup>

Persons who are deafblind may require the presence of interpreters who are expert in tactile sign language.<sup>591</sup>

- Diabetes

Diabetes is a condition that causes blood sugar to become too high. Type 1 diabetes is usually treated with tablets, specific diet, exercise, and sometimes insulin injections. Type 2 diabetes is also called “insulin-dependent diabetes” because individuals need insulin injections to live. The person with diabetes frequently needs to test their blood sugar levels, to make injections, and to carry some form of sugar with them (e.g., glucose tablets, fizzy drinks, chocolate).<sup>592</sup>

Reasonable accommodations can consist in organizing fixed breaks for blood testing and injecting, allowing food and drinks in the court, ensuring that the schedule does not interfere with time set for lunch or dinner.<sup>593</sup>

- Dissociation

Dissociation is a way that the mind copes with too much stress and it can be linked to trauma, or to a mental health problem or it can be a side effect of alcohol or medication. Persons who experience dissociation feel detached from their body and the world around them. This feeling can last from hours to up to months. Persons may be unable to remember information about themselves or they may experience the world as foggy or unreal. They may feel like they are seeing their emotions from outside, or they may feel disconnected from their body. They may also switch from different parts of their

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<sup>590</sup> Disability Access Bench Book, Australia, Section 7.7.

<sup>591</sup> Ibid. Section 7.7.

<sup>592</sup> Equal Treatment Bench Book, UK, pp 264.

<sup>593</sup> Ibid.

personality, use different names, or shift identity. People who have regular experiences of dissociation may be diagnosed with a dissociative disorder.<sup>594</sup>

Reasonable accommodations can consist of recording evidence when the person is not experiencing dissociation, providing an intermediary, allowing a support person, and allowing the person to give evidence in several different identities.<sup>595</sup>

- Dementia and Alzheimer's Disease

Dementia is not a specific disease, but it is a collection of symptoms that are caused by disorders affecting the brain. Alzheimer's Disease is one form of dementia. Dementia has impacts on thinking, memory, behaviour, visuospatial awareness, senses, and the ability to perform everyday tasks.<sup>596</sup>

Dementia can affect people in different ways and with different intensity. For this reason, promising practice consists of assessing each situation and establishing the adjustments considering the specific kind of dementia and the personal circumstances of the defendant. Examples of reasonable accommodations are allowing regular breaks, letting a support person participate in the hearing, and adjusting pace and tone when speaking.<sup>597</sup> Possible adjustments in the case of Alzheimer's Disease involve providing an intermediary, allowing a support person in the hearing, and recording evidence when the person is lucid.<sup>598</sup>

- Down Syndrome

Down Syndrome is a genetic condition resulting in an extra chromosome. Down Syndrome is characterized by a range of physical, health, characteristics, and

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<sup>594</sup> Ibid. p 265.

<sup>595</sup> Ibid.

<sup>596</sup> Disability Access Bench Book, Australia, Section 7.10.

<sup>597</sup> Ibid. Section 7.10.

<sup>598</sup> Equal Treatment Bench Book, UK, p 253.

developmental effects. A common characteristic of Down Syndrome is some degree of intellectual disability.<sup>599</sup>

Some persons with Down Syndrome may need communication adjustments like the use of communication aids, or the help of a support person.<sup>600</sup>

- Dyslexia

Dyslexia manifests itself as a difficulty with reading, writing, and spelling. The core challenges of dyslexia are the rapid processing of language-based information and weak short-term and working memory. By adulthood, many people have equipped themselves with coping strategies that allow them to deal with situations in which they experience difficulties. Some persons might also rely on technology for many aspects of their daily life.<sup>601</sup>

Various reasonable accommodations can be made at all stages of the proceeding. Before the hearing, oral instruction can be followed by written indications and reminders. The instructions shall be given in plain language, through electronic means, and in case of written indications, the formatting style shall be clear (e.g., at least 12 font sizes, great spacing, coloured paper). During the hearing, persons with dyslexia might need regular breaks, clear explanations, single-asked questions, time to think about the information, and the possibility of asking questions and clarifications. In general, they should not be expected to give very precise details or to remember everything and possible misunderstandings should not be regarded as evasiveness and inconsistency.<sup>602</sup>

- Dyspraxia/Developmental Coordination Disorder

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<sup>599</sup> Disability Access Bench Book, Australia, Section 7.9.

<sup>600</sup> Ibid. Section 7.9.

<sup>601</sup> Equal Treatment Bench Book, UK, pp 267.

<sup>602</sup> Ibid.

Dyspraxia is an impairment or immaturity of the organisation of movement. Persons with dyspraxia can be slow, hesitant, poorly coordinated, and with poor posture and balance. They might also have problems with speech because of poor control of mouth muscles. Sometimes they also show difficulties with social skills, short-term memory, sequencing skills, time management, decision-making, organizational skills, and managing changes and new routines. Persons with dyspraxia might also experience hypersensitivity to noise, touch, and light and they might feel overwhelmed by simultaneous tasks, complex information, and busy environments.<sup>603</sup>

- Eating Disorders

Eating disorders are characterized by an abnormal attitude to food affecting eating habits and behaviours. Eating disorders are often linked to anxiety, depression, or obsessive-compulsive disorders. There are various kinds of eating disorders including anorexia nervosa, bulimia, binge eating disorder, and EDNOS (eating disorders not otherwise specified). During a trial, persons with an eating disorder might appear tired, uninterested or they might have difficulties in focusing.<sup>604</sup>

Reasonable accommodations might include frequent breaks, lunch at agreed times, and avoidance about comments of the person's physical appearance.<sup>605</sup>

- Epilepsy

Epilepsy is a neurological disorder characterized by epileptic seizures. There are many types of seizures and persons can experience epilepsy in various ways depending on which part of the brain is affected. Some seizures can last for a few seconds (petit-mal or absence of seizures) and they can cause the individual to stop, stare, blink, or look vague. Some seizures can last for a few minutes (grand-mal or tonic-clonic seizures), and they can cause unconsciousness, body stiffness, and twitching. After these

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<sup>603</sup> Ibid. 271.

<sup>604</sup> Ibid. 272.

<sup>605</sup> Ibid.

seizures, individuals usually experience a period of drowsiness, confusion, and headaches. In some individuals stress and specific lighting can trigger seizures.<sup>606</sup>

Reasonable accommodations include providing a safe chair and trying to reduce the stress of the courtroom environment. In case of photosensitivity, flashing lights or fluorescent strip lighting shall be avoided. General knowledge about how to behave in case of a tonic-clonic seizure can be very useful to keep the person safe and to avoid alarm. In case of convulsions, harmful objects near the person should be removed and a cushion should be put under the head. During convulsions, the person should not be restrained or moved except in case of immediate danger, and nothing should be put in the mouth of the person. When the convulsions stop, the person should be put in the recovery position (i.e., on the side).<sup>607</sup>

- Fibromyalgia

Fibromyalgia is a long-term condition causing widespread and variable pain all over the body. The exact origin of fibromyalgia is still unknown, and its diagnosis is difficult. The symptoms are also various, and they include widespread continuous pain, extreme sensitivity, stiffness and muscle spasms, poor sleep quality, headaches, migraines, cognitive problems, and difficulties in remembering things. Sometimes persons also experience clumsiness, dizziness, restless legs syndrome, anxiety, depression, and irritable bowel syndrome.<sup>608</sup>

During the hearing, reasonable accommodations include regular breaks, late starts or shortened days, assistance with the trial bundle, slow pace during cross-examination, and rearrangement of the order of giving evidence to avoid times when exhaustion and pain are more present.<sup>609</sup>

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<sup>606</sup> Ibid. pp 273.

<sup>607</sup> Ibid.

<sup>608</sup> Ibid. pp 274.

<sup>609</sup> Ibid.

- Hallucinations

Hallucinations consist of the experience of seeing, hearing, smelling, or feeling things that do not exist outside their mind. Hallucinations may occur in persons with schizophrenia, bipolar disorder, dementia, Alzheimer's, Parkinson's disease, or Charles Bonnet Syndrome, but also as a consequence of drug use, alcohol withdrawal, extreme tiredness, or recent bereavement. Hearing voices is a recognized symptom of schizophrenia, bipolar disorder, and dementia. Visual hallucinations are also common with schizophrenia and Parkinson's disease.<sup>610</sup>

If the person is experiencing hallucinations during the hearing, it is important to consider whether it is possible to continue. In case the hearing continues, possible reasonable adjustments consist in adopting a calm manner, allowing evidence to be given behind screens or at another time, focusing on one question at a time and repeating questions. Other solutions are the use of an intermediary and of evidence in written form.<sup>611</sup>

- Heart disease

Heart disease can affect heart muscles, heart valves, blood vessels of the heart, or any other part of the heart. Examples of heart disease are congenital heart disease, cardiomyopathy, coronary artery disease, angina, heart attack (myocardial infarction), high blood pressure (hypertension), and heart failure.<sup>612</sup>

During the hearing, some persons shall be allowed to use a GTN spray or tablets to put under their tongue. After the use of this medication, they might need a break because GTN can cause palpitations, dizziness, light-headedness, or headache.<sup>613</sup>

- HIV and AIDS

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<sup>610</sup> Ibid. pp. 276.

<sup>611</sup> Ibid.

<sup>612</sup> Ibid. pp. 281

<sup>613</sup> Ibid.

HIV (human immunodeficiency virus) is a virus that attacks the immune system affecting the body's ability to fight infections. AIDS (acquired Immune Deficiency Syndrome) is the final stage of HIV infection when the body is no longer able to fight certain infections or diseases like TB or cancer. Many stigmas, myths, and misconceptions are still present about HIV and AIDS.<sup>614</sup>

Reasonable accommodations include increased breaks and shorter days, availability of water, and easy access to toilets.<sup>615</sup>

- Incontinence

Incontinence consists of an inability to control natural functions, or a need to rely on bags and pads. Stress can make matters worse.<sup>616</sup>

Reasonable accommodations can include regular breaks, accessible toilets near the courtroom, the location of the court venue near the house of the defendant, and a pre-agreed signal to indicate when the person needs an immediate break. In extreme cases, the evidence can be taken by video link.<sup>617</sup>

- Inflammatory bowel disease

Inflammatory bowel disease is a general term including Crohn's disease and ulcerative colitis, but it does not include irritable bowel syndrome (IBS). While Chron's disease affects the entire gut from mouth to anus, ulcerative colitis affects the large intestine. They both can cause abdominal pain, bloody diarrhea, and general ill health.<sup>618</sup>

The reasonable accommodations include regular breaks, accessible toilets near the courtroom, location of the court venue near the house of the defendant, and a pre-

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<sup>614</sup> Ibid,pp.272

<sup>615</sup> Ibid.

<sup>616</sup> Ibid,pp.283.

<sup>617</sup> Ibid.

<sup>618</sup> Ibid, 284.

agreed signal to indicate when the person needs an immediate break. In extreme cases, the evidence can be taken by video link.<sup>619</sup>

- Intellectual disability

Intellectual disability is characterized by significant limitations in intellectual functioning and adaptive behaviours. There are various types and degrees of intellectual disability. Persons with intellectual disability may have difficulties in communicating, interacting with other people, and living independently. People with intellectual disabilities need more time to understand spoken and written information, and they may have difficulties understanding instructions or abstract concepts. They may also have problems related to attention span and memory and become tired easily.<sup>620</sup>

- Laryngectomy

Laryngectomy is the removal of the larynx, and it is usually a result of cancer. After the surgery, individuals have to relearn how to speak. There are three main ways of assisting with speech: a voice prosthesis or trachea-oesophageal puncture, oesophageal speech, or electrolarynx.<sup>621</sup>

Possible reasonable accommodations include using writing facilities and evidence in written form before the hearing and asking only essential questions.<sup>622</sup>

- Learning disabilities

Learning disability is a life-long condition acquired before, during, or soon after birth, that affects intellectual development. It should not be confused with the “specific learning difficulties” such as dyslexia. Learning disability can be mild, moderate, or severe. People with a learning disability have difficulties to understand and remember new or complicated information, to learn new skills, and to generalize any learning to

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<sup>619</sup> Ibid.

<sup>620</sup> Disability Access Bench Book, Australia, p.4.

<sup>621</sup> Equal Treatment Bench Book, UK, p. 285.

<sup>622</sup> Ibid.

other situations. Some persons are unable to read or have difficulties in speaking, and some individuals might also have problems in accomplishing daily tasks.<sup>623</sup>

There is a wide range of possible reasonable accommodations in the case of defendants with learning disabilities. During the hearing, there can be adjustments including a visit to the tribunal before the start of the trial, live links or screens, frequent breaks, the use of an intermediary, plain language, communication aids, and further explanations about the context and the procedure. Even in evaluating the evidence, the person's learning disability should be taken into account. Another promising practice is the use of Makaton and the presence of an interpreter who knows it. Makaton is a language programme that enables persons with communication difficulties to express themselves independently.<sup>624</sup>

- Lupus

Lupus is an autoimmune condition that can range from mild to life-threatening. The main symptoms are fatigue, joint pain, and rashes. Potential symptoms are high blood pressure, migraine, Raynaud's disease, seizures, depression, and memory loss.<sup>625</sup>

Appropriate reasonable accommodations depend on the nature and severity of the symptoms. In general, reducing the stress of the proceeding might be helpful. Possible ways to reduce the stress include additional breaks, expediting the final hearing date, lack of delays, short final hearings, and a calm tone during the cross-examination. Another possible solution is giving the person the possibility to give evidence first.<sup>626</sup>

- Mental health disability

Mental health disability can include mood disorders (e.g., depression, postnatal depression, bipolar disorder), anxiety disorders (e.g., phobias, panic attacks, social

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<sup>623</sup> Ibid, pp 285.

<sup>624</sup> Ibid.

<sup>625</sup> Ibid. pp 288.

<sup>626</sup> Ibid.

and general anxiety, obsessive-compulsive disorders), and psychotic disorders (e.g., schizophrenia, some forms of bipolar disorder). Mental health disabilities may affect the way persons think, feel, and interact.<sup>627</sup>

It is important to not stigmatize mental health problems and be aware that they might be only episodic. Possible adjustments can be various, and they depend on the specific problem and on what triggers the person. Examples of possible adjustments are allowing regular breaks, limiting the number of people in the courtroom, allowing a postponement for medical reasons, allowing video links, setting more specific rules for cross-examination, giving extra time to answer, and providing reassurance if necessary.<sup>628</sup>

- Migraine

Migraine is a condition of recurring headaches of a particular kind. Migraine usually presents other symptoms like sensitivity to light and noise, eyesight changes, lethargy, and nausea. Some persons might experience migraine with “aura”, presenting neurological symptoms like changes in sight (e.g., zigzags, dark spots), disturbances to speech, and hearing or partial paralysis. Migraine attacks usually last one or two days and are often unpredictable.<sup>629</sup>

Possible reasonable accommodations are allowing additional breaks, shortened days, food and water in the courtroom, reduced lighting, easier questions and indications, and additional time to process information. In general, a promising practice consists in consulting the individuals on what triggers their migraine.<sup>630</sup>

- Mobility Impairment

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<sup>627</sup> Disability Access Bench Book, Australia, Section 7.11.

<sup>628</sup> UK's Equal Treatment Bench Book, pp 289.

<sup>629</sup> Ibid, pp.291.

<sup>630</sup> Ibid.

Mobility impairment can depend on a leg or foot impairment, general muscular weakness, illness, or injury. Persons with a mobility impairment may use an aid like a stick, crutches, or a wheelchair.<sup>631</sup>

In the case of a defendant with a mobility impairment, the accessibility of the courtroom is essential. The entrance and the route to the venue shall be accessible as well as the route to and from the witness box. The courtroom shall also present appropriate setting arrangements, accessible toilets, and safe procedures in case of fire or when the lifts cannot be used. Moreover, users with wheelchair should be allowed to have a position with a good sight of the judge and the advocates. Carers or amanuensis should be allowed to participate, and the hearing should not finish late to avoid the rush when the individual will use public transport. Finally, the defendant shall not be required to stand up for the judge, and their aids shall not be touched or moved without their consent.<sup>632</sup>

- Motor Neurone Disease

Motor Neurone Disease is a rare and progressive degenerative disease that affects the motor neurons. Motor neurons are specialized nerve cells, and their control is important for activities like walking, speaking, breathing, and swallowing. This disease leads to a gradual loss of functions that culminates in total body paralysis and significant breathing difficulties. In most cases, intellect and memory remain intact but the individual depends fully on others for daily functions.<sup>633</sup>

Reasonable accommodations should be provided depending on the level of impairment. The adjustments required in the case of a defendant with motor neurone disease mainly coincide with those needed in case of mobility impairment. Other examples of useful reasonable accommodations are additional breaks, video links, and

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<sup>631</sup> Ibid, pp.292.

<sup>632</sup> Ibid.

<sup>633</sup> Ibid. pp 294.

writing facilities. Moreover, the questions should be kept at a minimum and the hearing might be held even at the home of the defendant if necessary.<sup>634</sup>

- Multiple Sclerosis

Multiple sclerosis is a disease affecting nerves in the brain and spinal cord. It causes problems with muscle movement, balance, and vision. There are different types of multiple sclerosis, and they can affect persons in very different ways. Some persons experience the relapsing-remitting type that consists of one short-lived episode and subsequent symptom-free periods. Other persons experience secondary progressive type of multiple sclerosis that can deteriorate rapidly.<sup>635</sup>

The symptoms of multiple sclerosis vary widely and consulting the person is an effective way to understand the individual needs and the extra aid and assistance that should be organized. In general, reasonable accommodations for a defendant with multiple sclerosis are frequent breaks, shortened days, availability of water, and the use of a fan or air conditioning because extreme heat can cause a relapse. If the person has mobility impairment, the same reasonable accommodations described in the section on Mobility Impairment should apply.<sup>636</sup>

- Myalgic Encephalomyelitis (ME)/Chronic Fatigue Syndrome

Myalgic Encephalomyelitis (ME)/Chronic Fatigue Syndrome is a neurological disease characterized by debilitating fatigue which can be triggered by minimal activity. The symptoms may include malaise, headaches, sleep disturbance, difficulty with concentration, and muscle pain. The symptoms may fluctuate in intensity and variety. Some persons use a wheelchair.<sup>637</sup>

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<sup>634</sup> Ibid.

<sup>635</sup> Ibid. pp.295.

<sup>636</sup> Ibid.

<sup>637</sup> Ibid. pp 296.

Reasonable accommodations include additional breaks, shorter days, late starts in the morning, supportive chairs, low lights, a quiet environment, and adjustments to communication and cross-examination style. If the person presents mobility impairment, the accessibility adjustments required in the section Mobility Impairment should be applied.<sup>638</sup>

- Obesity

Obesity does not have a consistent definition. In most cases, the person's body mass index (BMI) is a good indicator. IBM can be misleading when someone has a lot of muscle. Normally BMI of 25-29.9 is considered overweight and 30-39.9 is considered obese.<sup>639</sup>

In some cases, some adjustments can be made. These adjustments include large ergonomic chairs, arrangements for a comfortable chair witness table, and no delays to avoid the rush of the defendant.<sup>640</sup>

- Parkinson's disease

Parkinson's disease occurs when the brain no longer produces enough of a substance called dopamine which is necessary for movement. Symptoms vary from person to person, but the main symptoms are usually tremors -especially hand tremors-, slowness of movement (bradykinesia), and muscle stiffness or rigidity. Other typical symptoms are fatigue, drooling, constrained handwriting, and softness of voice.<sup>641</sup>

Possible reasonable accommodations are additional breaks, assistance with the trial bundle, or pouring water. If the defendant has a mobility impairment, the same

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<sup>638</sup> Ibid.

<sup>639</sup> Ibid. pp 297.

<sup>640</sup> Ibid.

<sup>641</sup> Ibid. pp 299.

reasonable accommodations described in the section Mobility Impairment shall apply also here.<sup>642</sup>

- Pathological and Demand Avoidance

Pathological demand avoidance (PDA) consists of avoiding everyday demands and expectations to an extreme extent. People with PDA have usually a need for control that is often anxiety related. These persons may have difficulties with smaller implied demands within larger explicit demands, time and time-keeping demands, advance planning, expectations, and praise. Some people may also face problems with internal demands like personal expectations and desires or bodily demands. A distinctive characteristic of the person with PDA is the use of social strategies to avoid demands. The PDS Society says that there is a hierarchy of avoidance approaches. First, the person makes attempts to distract, make excuses, and delay; then the person feels physical incapacity with a reduction of meaningful conversations and withdrawal to fantasy; then there is a phase of taking control in which there is complete compliance but a later breakdown; finally, the person experience panic accompanied by agitation, aggression, shut down, running away, self-harm.<sup>643</sup>

The problem of the legal process is that is full of direct and indirect demands, and it is characterized by strong uncertainty. Possible reasonable adjustments are trying to reduce uncertainty with an explanation of the various steps and requests, not giving many simultaneous tasks, and making the demands more indirect. Moreover, the judge can explain the reasons behind deadlines, or, where possible, give the individual some autonomy and flexibility. Regular breaks and patience when the person refuses to do something are also useful.<sup>644</sup>

- Persecutory Delusions

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<sup>642</sup> Ibid.

<sup>643</sup> Ibid. pp 301.

<sup>644</sup> Ibid.

Paranoia consists of unfounded beliefs that other people intend to harm the individual. Delusions are paranoid thoughts. Paranoia has a range of severity and the most severe forms consist of persecutory delusions. Persons with persecutory delusions have strong paranoid convictions and no facts or reason can change the person's thinking. This is a form of psychosis. Persons might experience persecutory delusions all the time or only occasionally when under stress. They can be related to some serious mental illness problems like delusional disorder, schizophrenia, and bipolar disorder.<sup>645</sup>

It is important to avoid disregarding the person's evidence only because of the delusions. Indeed, there are very specific delusions -e.g., a delusion concerning only a specific individual- and the severity of delusions might vary. For this reason, the weight of the evidence coming from the person should be assessed case by case. There are also some indications to respond to a delusion during a trial. The judge and the other legal professionals shall listen to the person, not dispute the delusion, and not engage with the delusion or try to use logic to shift it. They shall simply focus on the elements that are verifiable and be careful with their body language and way of communicating.<sup>646</sup>

- Raynaud disease

Raynaud's disease is a condition affecting blood supply to certain parts of the body like fingers and toes. The person's blood vessels go into a temporary spasm that can last for a few minutes or several hours. The person has difficulties in using fingers when they are affected. The phenomenon can be triggered by cold, anxiety, or stress.<sup>647</sup>

Reasonable accommodations may consist of ensuring a warm room and regular breaks if the room is not enough warm. The persons should also be allowed to wear a

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<sup>645</sup> Ibid. pp 303.

<sup>646</sup> Ibid.

<sup>647</sup> Ibid. p. 304.

hat, a scarf, or gloves if needed. Assistance for maneuvering the trial bundles might also be needed.<sup>648</sup>

- Sickle Cell Disease

Sickle Cell Disease is a general term for a set of inherited conditions affecting red blood cells. The most serious disease is the sickle cell anaemia. The main symptoms are anaemia, increased risk of serious infections, and episodes of pain known as “sickle cell crisis” when small blood vessels become blocked. Dehydration, stress, strenuous exercise, and bad weather may be factors leading to the crisis.<sup>649</sup>

Reasonable accommodations may be access to water, regular breaks, a warm courtroom, and the possibility for the defendant to sit down.<sup>650</sup>

- Spina Bifida and Hydrocephalus

Spina bifida is a general term referring to specific congenital abnormalities that affect the spine and central nervous system. There are three different types of spina bifida (spina bifida occulta, spina bifida meningocele, and spina bifida myelomeningocele) and the severity of the disability varies from one type to the other. Spina bifida myelomeningocele is the most severe type and it can result in partial or total paralysis of the lower limbs and incontinence. People usually present learning disabilities because of a condition of water in the brain (hydrocephalus). For this reason, they might present memory problems, impaired speech, short attention span, problems with organizational skills, visual problems, problems of coordination, and epilepsy.<sup>651</sup>

The reasonable accommodations in these cases can be regular breaks, the selection of the avenue near the home of the person, and video links for taking evidence. In the cases in which the person has mobility impairment or is in a wheelchair, the same

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<sup>648</sup> Ibid.

<sup>649</sup> Ibid. p.305.

<sup>650</sup> Ibid.

<sup>651</sup> Ibid. pp. 307

reasonable accommodations recommended in the section of the Mobility Impairment apply also here.<sup>652</sup>

- Spinal Cord Injury

Spinal cord injuries are very variable, and they can be complete or incomplete. Some spinal injuries can result in complete paralysis below the point of injury, and they may present other medical complications like bladder, bowel disfunction, and increased susceptibility to respiratory and heart problems. Some persons may have impaired breathing and they may depend on a ventilator. They may also use adapted power wheelchairs and equipment that may be controlled through mouth control voice activation, chin control, head control, eyebrow control, or eye blinking.<sup>653</sup>

The reasonable accommodations in these cases can be regular breaks, the selection of the avenue near the home of the person, and video links for taking evidence. In the cases in which the person has mobility impairment or is in a wheelchair, the same reasonable accommodations recommended in the section of the Mobility Impairment apply also here.<sup>654</sup>

- Stammering

Stammering is a neurological condition causing a person to repeat, prolong, or block sounds and words when speaking. Persons may have moments in which they stammer and times when they speak fluently. The severity of stammering varies also from person to person. Stammering can be accompanied by secondary behaviours that are caused by the efforts to avoid stammering and to speak fluently. Examples of these behaviours are bodily tension and involuntary movements (e.g., quivering lips, blinking eyes, tapping fingers, grimacing, stamping feet). People might also change words,

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<sup>652</sup> Ibid.

<sup>653</sup> Ibid. p. 308.

<sup>654</sup> Ibid.

avoid words they usually stammer on or use filler words like “um”, “eh”, “you know”, or “actually”.<sup>655</sup>

During the trial, persons with stammering might have problems in speaking and answering the questions, so they might need more time to answer, avoid talking a lot, not present their argument fully, choose different words to avoid stammering, avoid asking further questions, and they might show nervousness. The judge might have difficulties understanding why the person is not putting forward their views, evidence, or arguments and why the person is talking in an artificial way showing nervousness. In this way, the judge might be influenced in judging the reliability of the individual.<sup>656</sup>

During the hearing, persons with stammering should be reassured and should have the time to answer at their speed. The judge can also check the turn-taking and control whether the person has something to say or has understood everything. In general, the judge should be cautious about making assumptions based on the slow speed, the use of filler words, the nervousness, the hesitation in speaking, and other elements that might derive from stammering. In some cases, hearing through video links, the use of intermediaries, and the use of written evidence might be useful. In general, a quiet courtroom, help during the oath (e.g., let the clerk or user say the words simultaneously with the defendant), patience, and respect for the defendant’s speed in talking are clever and simple ways to help a defendant with stammering.<sup>657</sup>

- Visual Stress

Visual stress is a general term that describes a set of difficulties with reading owing to visual perceptual dysfunction. The condition is described as “discomfort with reading” and it is frequently associated with dyslexia, dyspraxia, migraines, and epilepsy. In the most severe cases, the person with visual stress presents sensitivity to bright light and

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<sup>655</sup> Ibid. pp. 309.

<sup>656</sup> Ibid.

<sup>657</sup> Ibid.

might be disturbed even by the glare of a white paper. Common consequences are losing the place, omitting, or misreading words, fatigue, and headaches.<sup>658</sup>

In the case of a defendant with visual stress, some promising practices can be applied. For instance, during the hearing, the judge can allow more time for the person to read the documents or can make someone else read excerpts from the documents. The documents should also be written in tinted paper, with adequate spacing, justification of the text, avoidance of capitalization for whole words or sentences, and a font at least size 12.<sup>659</sup>

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<sup>658</sup> Ibid. 313.

<sup>659</sup> Ibid.

**ANNEX III SUMMARY OF  
THE PRACTICAL  
GUIDANCE AND  
SYSTEMIC  
RECOMMENDATIONS**

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### **III. Access to Justice for Persons with Disabilities**

#### **A. Equal treatment before the law, legal capacity and equal participation**

##### *Practical guidance and recommendations*

1. **State justice actors must, within the parameters of their respective responsibilities, ensure that they accord persons with disabilities equal treatment with others in interactions with the justice system. Responsible authorities must provide persons with disabilities with gender<sup>660</sup> and disability appropriate procedural and reasonable accommodations where needed to facilitate their participation on an equal basis**
  - A. Justice actors should interpret existing laws and policies consistently with the CRPD.
  - B. Justice actors should act to ensure that procedural accommodations and other supports to facilitate their effective participation are provided for persons with disabilities, where necessary.
2. **Responsible justice actors should respect and ensure the effective right to participate from the first contact with law enforcement, during the proceedings and in all following stages of it.**
  - A. The right encompasses access to counsel and, where necessary, legal aid, and the accompaniment of support persons of the defendant's choosing in all stages of criminal proceedings, starting from the first contact with law enforcement.
  - B. No person with a disability should be compelled to have a person assisting them without them being able to voice their preferences or without their consent.

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<sup>660</sup> For more details on gender-appropriate procedural accommodations, please see: Validity Foundation, [Fair Trial Denied: Defendants with Disabilities Face Inaccessible Justice in the EU](#), 2024, p. 71ss.

3. **Responsible justice actors should ensure safe, fair and effective engagement of persons with disabilities in the proceedings and the opportunity to fully participate in proceedings.**
4. The responsibility includes the provision of adjustments, accommodations and supports, including intermediaries, support services, or support persons, wherever and whenever needed, to enable clear communication among and between persons with disabilities and courts, **Responsible justice actors should implement a supported decision-making approach, whereby a person with a disability continues to hold all decision-making authority and autonomy. Judges should always ensure direct contact with the defendant with a disability even where others are included in such contact to provide that person with support.**
  - A. If a petition for guardianship is made, it should be denied on the grounds of violating the person’s individual autonomy.
  - B. **The role of an intermediary or a lawyer must not** replace the direct contact of the defendant with the judge.
5. **Lawyers should ensure that decisions that directly or indirectly involve participation in the proceedings of the defendant with a disability, are with the defendant.**
  - A. The supported decision-making model for defendants with disabilities means that the defendant with a disability is the person making the decision. If they choose to include a support person, the work of the support person is to ensure the decision is made at the defendant’s will and preference.
6. Justice actors must **ensure that constructs such as “cognitive incapacity” and “mental incapacity,”** as determined, for instance, by functional or mental status assessments, are not used to restrict a person’s right to legal capacity.

7. If a defendant with a disability is determined, after the provision of all necessary support to participate in a complete legal process to **lack the necessary intent** (mens rea) within the usual meaning of the term, they should be treated the same way as any other defendant who lacks intent.<sup>661</sup>
8. Justice actors must ensure that **any assessments** conducted in respect of defendants with disabilities before and during court proceedings are **aimed only at determining the procedural accommodation and support** required to ensure their full and effective participation in the proceedings. Such assessments must have the will and preference of the individual with a disability as their central focus.

### Systemic Recommendations

1. **Persons with disabilities must have equal access to the proceedings and to the defence**
  - A. **A system of support services** and procedural accommodations to **ensure effective participation** of persons with disabilities in proceedings and trials must be developed and implemented in practice (*see below the details on procedural accommodations*), from the first stages of the criminal justice process, and throughout the proceedings.<sup>662</sup>
  - B. From the earliest stages of the proceedings, identification of the needs for procedural accommodations and supports must take place (*see section IV.1.2 Process for individual assessment for adoption of procedural accommodations below*). Procedural accommodations should be present before, during and after the termination of proceedings to prevent discrimination **and throughout all processes**.

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<sup>661</sup> Access to Justice Knowledge Hub, Implementing the Convention on the Rights of persons with disabilities in criminal justice systems, A briefing paper, July 2022, p. 19.

<sup>662</sup> Access to Justice Knowledge Hub, Implementing the Convention on the Rights of persons with disabilities in criminal justice systems, A briefing paper, July 2022, p. 19.

- C. A **monitoring mechanism** should be put in place in order to monitor whether procedural accommodations are being used and complied with.
2. **Recognize and assume the full legal capacity and right of defendants with disabilities to participate in all stages of the proceedings and in all courts.**
    - A. Ensure that defendants who have been previously **declared to be without legal capacity** to participate in court proceedings have the right to appeal or otherwise seek restoration of their legal capacity and have access to accommodations and supports, as well as legal assistance to participate in court proceedings.
    - B. Judges and other relevant justice actors should bring to the attention of the lawmakers any legislation that is in violation of the CRPD.

**Promising Practice –**

In Spain, Law 8/2021<sup>663</sup> recognized legal capacity for all people with disabilities, guardianship was eliminated, and judicial measures of support for people with disabilities are adopted as a last resort. In this way, the Spanish legislation moved from a system of substitution of decision-making to a system of support in decision-making.

- C. Where possible under the national legal system, the judges may initiate proceedings for review of the validity of the legislation incompatible with the CRPD

**Promising Practice**

For instance, judges in Slovakia may start proceedings before the Constitutional Court to strike down the legislation.

3. **A review of policies, guidelines and practices should be undertaken by State authorities.**

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<sup>663</sup> Law 8/2021, Ley de 2 de junio, por la que se reforma la legislación civil y procesal para el apoyo a las personas con discapacidad en el ejercicio de su capacidad jurídica, «BOE» No. 132, 3 June 2021.

- A. States shall review and, where necessary eliminate or revise policies, guidelines and practices that serve directly or indirectly restrict the legal capacity of persons with disabilities, including those that contain and apply doctrines of “**unfitness to stand trial**” and “**incapacity to plead**”, which prevent persons with disabilities from participating in legal processes based on questions about or determinations of their capacity;
  - B. States shall review and where necessary eliminate or revise policies, guidelines and practices that authorize **medical professionals** to be the sole or preferred “experts” in determining how and to what extent and with what support persons with disabilities can participate in legal proceedings;
  - C. States shall review and where necessary eliminate or revise policies, guidelines and practices, including court orders, that subject defendants with disabilities to **detention** (whether in a prison, a mental health facility or any other institution) for a definite or indefinite term based on perceived “dangerousness” or need for care that arises from the condition of disability.
- 4. **States should develop community-based support and services to replace institutionalization, security measures or forced medical and psychiatric treatment in institutions.**
  - 5. States should take measures to improve the current process for **exchanging medical records** in order to establish a clear system for passing on information as individuals move through the criminal justice system, which is essential to minimize errors and guarantee appropriate care and medication access.<sup>664</sup>

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<sup>664</sup>Mental Health Perspectives, [Briefing paper on barriers faced by defendants with intellectual and/or psychosocial disabilities in the Criminal Justice System in Lithuania](#), Vilnius, ENABLE Project, 2023, p. 60.

6. **States should collect disaggregated data** on the participation of persons with disabilities in the justice system and, using that data, develop and implement strategies to reform policies, practices and laws to ensure equal access to justice.

## **B. Restorative justice principles**

### Systemic recommendations

1. **Systemic: Alternatives to traditional criminal justice systems such as through restorative justice processes and principles should be implemented across the criminal justice systems and be equally accessible to persons with disabilities.**<sup>665</sup>
  - A. Alternative systems should ensure that defendants with disabilities are provided whatever accommodations and supports are needed to participate equally.
  - B. Restorative justice should be included in legal studies curricula, as well as in trainings for justice actors. (*See also further below in training*)

## **C. Training of professionals**

### Systemic recommendations

1. **States should provide, periodic and high quality training, on a mandatory basis, to justice actors.**
  - A. Develop a consistent and **coordinated training plan** regarding disability issues targeting the different justice system professionals.
  - B. Create a **system of ongoing mandatory training** for justice actors who interact with persons with intellectual and/or psychosocial disabilities:<sup>666</sup>

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<sup>665</sup>KERA Foundation, [Briefing paper on barriers faced by defendants with intellectual and/or psychosocial disabilities in the Criminal Justice System in Bulgaria](#), Veliko Tarnovo, ENABLE Project, 2023, p. 68.

<sup>666</sup> Centre for Legal Resources, [Briefing paper on barriers faced by defendants with intellectual and/or psychosocial disabilities in the Criminal Justice System in Romania](#), Bucarest, ENABLE Project, 2023, p. 36.

- i. For judges, legal practitioners and police personnel there should be a focus on the **human rights-based model of disability, on access to justice, procedural accommodations, identification of persons with disabilities, and on communication** with all persons with disabilities including persons with intellectual and/or psychosocial disabilities.
  - ii. For all justice actors, there should be focus on **how to communicate with a person with disability, on the impact of detention and medical treatment of persons with disabilities** and how in particular medication affects them in court, or a hearing. (These include, for example, slow responses or the fact that hearings should not be scheduled shortly after the person received medical treatment).
2. **States should guarantee effective participation of persons with disabilities in training.**
  - A. Persons with disabilities **should be involved in the development and training of justice actors**, including, for the purpose of facilitating a better understanding by justice actors of the experiences of persons with disabilities in legal processes.

## **IV. Procedural rights of persons with disabilities at all stages of the administration of justice<sup>667</sup>**

### **A. Right to procedural accommodations**

#### **Requests for and offers of accommodations**

##### *Practical guidance and recommendations*

1. **A defendant's right to a fair trial and due process in the administration of justice, on an equal basis**, with others must be respected from the first contact with law enforcement officers and throughout all processes, *including* through access to **procedural accommodations**.
  - A. **Responsible justice** actors must ensure that **procedural accommodations** are available for persons with disabilities to allow for their participation in each procedure, from the first contact with law enforcement authorities and through all processes.
  - B. All procedural accommodations should be **gender- and age-appropriate**.
  - C. Persons with disabilities should **participate in the process of the identification and determination of their disabilities**. Where there is an indicia that an individual may have a disability there is an obligation on the authorities to make a full determination, taking into account the individual's views.
  - D. **Adequate support services** should be made available within the criminal justice system to ensure the provision of procedural accommodations for persons with disabilities.
    - i. **Where identification of needs for procedural accommodations needs to be in place, it must be done at the beginning of the proceedings, at the earliest stage.**

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<sup>667</sup> Recommendations in sections IV.1-IV.4 are applicable to all proceedings, not only criminal proceedings.

- ii. **Preparations** for procedural accommodations and other adjustments in the hearing must be made prior to the police or other official interview, or prior to the hearing/trial.
2. All participants, including defendants with disabilities, should **be informed about their rights and the availability of procedural accommodations** throughout the course of the proceedings.
  - A. Authorities must ensure that defendants **are made aware of the possibility** of having procedural accommodations throughout the proceedings and know that **they can request them at any time**.
  - B. It should **not be the sole responsibility** of the defendant to request the accommodations. Responsible justice actors have a proactive duty to initiate the provision of accommodations.
3. Justice actors and national authorities should **consult closely with and actively involve persons with disabilities** and their representative organizations in all discussions and decision-making regarding procedural accommodations.
4. **Responsible actors should cooperate** to establish a uniform and effective framework for providing appropriate procedural accommodations for defendants with disabilities. Effective coordination is necessary at central and local levels.

### Systemic recommendations

1. Judiciaries should develop and adopt regulations and standards that recognize and enforce the right to receive procedural, age and gender-appropriate accommodations, including support, necessary to enable defendants with disabilities to exercise their legal capacity, and participate effectively in any applicable judicial or administrative proceedings.<sup>668</sup>

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<sup>668</sup> These include adaptation of the venue allowing leading questions, avoiding compound questions, finding alternatives to complex hypothetical questions, providing extra time to answer, permitting breaks as needed and using plain language; and use of pre-trial video recording of evidence and testimony, if necessary, practical and possible, in such a manner as not to contravene

2. A **comprehensive procedure for recognizing, requesting, assessing, and providing** individual support for persons with disabilities should be developed and implemented.
3. Clear and **effective procedures relating to the provision of procedural accommodations** must be developed and implemented by justice actors whenever a person with a disability, and in particular a person with intellectual and/or psychosocial disabilities, interacts with the criminal justice system.
  - A. A **guide or manual on procedural accommodations for the administration of justice** should be produced and widely disseminated to facilitate the correct approach by justice actors concerning persons with disabilities.

### **Process for individual assessment for adoption of procedural accommodations**

#### *Practical guidance and recommendations*

1. A **practical mechanism to identify disability early in legal processes through an individual assessment** should be developed and implemented, so that all necessary measures are taken to ensure that the person with a disability will go through the entire criminal justice process on an equal basis.
  - A. identification, for example through an individual assessment, should occur early in the criminal justice process **at the very beginning of the proceedings, and prior to any actions undertaken** as part of the criminal justice proceedings, for instance prior to a police interview.
  - B. The police, other law enforcement authorities and any other justice actor or individual involved in the identification of **disability must, after identifying the individual has a disability, ensure the provision of**

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basic rights, such as the right to confront and cross-examine witnesses.; appropriate waiting spaces; removal of cloaks and wigs; adjustments to the pace of proceedings; separate building entrances and waiting rooms and protective screens to separate persons with disabilities from others if necessary due to physical or emotional distress; modifications to the method of questioning in appropriate circumstances, such as

assistance, accommodations and support from the early stages of the proceedings.

- C. Justice actors and other individuals involved in the identification of disabilities during criminal justice processes should be **adequately trained on the nature and definition of disability and the purpose of the identification of an individual's disability; the legal rights of persons with disabilities; and the duty to provide procedural accommodations to persons with disabilities.**

### **Promising Practice**

In some, countries, such as the UK and Spain, this assessment can be done by intermediaries. In Spain, intermediaries can be provided freely by NGOs like Plena Inclusion.<sup>669</sup> When prison officers suspect that a person has an intellectual disability, they contact Plena Inclusion that conducts an assessment and provides assistance in obtaining official recognition.<sup>670</sup>

- D. The primary purpose of the identification of a disability should be to obtain the information required for the competent authority to determine and decide, in consultation with the person with a disability **the provision of procedural accommodations.** This process should never be used as a means of diminishing participation of an individual or excluding participation entirely.
2. Judges and other justice actors should, at later stages in the legal process, **verify that the individual assessments have been completed** early in the process prior to the matter appearing before them.
  3. Defendants so assessed should be informed about the details of the individual assessment, **be involved in its development**, and should receive it when

<sup>669</sup>Plena Inclusión, *Briefing paper on barriers faced by defendants with intellectual and/or psychosocial disabilities in the Criminal Justice System in Spain*, Madrid, ENABLE Project, 2023, p. 20.

<sup>670</sup>Ibid. 667. p. 30.

finalized. They should have the right to comment on such an assessment and, if necessary, contest it.

### Systemic Recommendations

1. **Responsible authorities should identify and disseminate best practices** regarding the identification of disability and develop and implement trainings focusing on the human rights model of disability and the procedural accommodations which should be made so that persons with disabilities can participate on an equal basis in all legal processes.<sup>671</sup>

#### **Promising Practice**

In Bulgaria, the courts use an “NGO assessment of the social functioning of persons with disabilities and their special needs.”<sup>672</sup> This assessment is designed to be used in all courts addressing cases with persons with disabilities. It aims to increase effective participation in the trial and to improve the protection of the person’s rights and interests.<sup>673</sup>

2. **Information sharing rules and safeguards** should be in place when an individual assessment is being conducted by justice actors.

### **Independent intermediaries / facilitators**

#### Practical guidance and recommendations

1. **Where needed, an intermediary should be called to assist in communication during police interviews with the person with a disability suspected of the crime.**
2. **As a form of procedural accommodation, intermediaries should be provided to defendants with disabilities wherever and whenever needed, to enable clear**

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<sup>671</sup> FENACERCI, [Briefing paper on barriers faced by defendants with intellectual and/or psychosocial disabilities in the Criminal Justice System in Portugal](#), Lisbon, ENABLE Project, 2023, p. 61.

<sup>672</sup> KERA, Plena Inclusión, [Briefing paper on barriers faced by defendants with intellectual and/or psychosocial disabilities in the Criminal Justice System in Bulgaria](#), Veliko Tarnovo, ENABLE Project, 2023, p. 31.

<sup>673</sup> Ibid.

communication between them, the police, and justice actors, including the courts, to ensure safe, fair and effective engagement, and to provide the opportunity to fully participate in all stages of proceedings. This requires that:

- A. A sufficient number of trained intermediaries be made available for persons with disabilities from the start of the proceedings, and at all stages of the administration of justice.
- B. Systematic training on the role of intermediaries are in place.
- C. The use of intermediaries do not generate costs for persons with disabilities.
- D. In the absence of sufficient and qualified court-appointed intermediaries, courts work collaboratively with stakeholders who provide such support to persons with disabilities.

### Systemic recommendations

1. In the long-term, procedural accommodations – including the possibility of an intermediary– should be included in national legislation and rules applicable to the Courts to ensure the full implementation of the CRPD in the justice systems.
2. National law should include the regulation on the position of intermediaries, which should include who can be an intermediary, what conditions need to be fulfilled, a code of ethics, and the need to remain independent part in the process.
3. Even where NGOs provide the resources to ensure intermediaries in the proceedings, the State has the obligation to provide necessary financial, material and human resources (for intermediaries) and should give practical effect to this responsibility.

## **Right to be accompanied by a support person**

### Practical guidance and recommendations

1. From the first contact with the authorities, persons with disabilities should **be informed of their right to be accompanied by a support person of their choice, that could include a family member. States should ensure that:**
  - A. if an individual with a disability so wishes, such trusted support persons can be present during all stages of the proceeding;
  - B. a procedure by which the role of such a support person is clearly determined and regulated;
  - C. no person with a disability is compelled to allow the participation of any such support persons in their legal affairs at any stage of legal proceedings against their will and preferences;
  - D. the role of an intermediary is not conflated with or replaced by a support person. The intermediary and the support person have different roles, and, where needed, provision for the participation of both should be made.
2. There should always be a **face-to-face contact with the trusted support person** if the individual with a disability desires such contact.

## **Procedural adjustments and modifications**

### Practical guidance and recommendations

1. The responsible State authorities should ensure that venues in the justice system where legal processes take place, including waiting areas, are always sufficiently adapted and accessible for persons with disabilities – and appropriate to the specific needs of the person.
2. **In addition to a physical environment, responsible State authorities should consider adaptation of venues on a case-by-case basis in consultation with an**

individual with disability, their intermediary and/or support person. The following could be considered:

- A. Limiting the exposure of the defendants to the public or more generally their contact with other persons;<sup>674</sup>
- B. considering the seating and positioning to be adapted when needed (for instance lawyers sitting with their backs to the defendant with disability in court may need adaptation); and
- C. taking measures to ensure that the contact with the justice system is, as far as possible, not intimidating.

## **B. Right to information and communication in accessible formats**

### Practical guidance and recommendations

1. **Every person with a disability has the right to make choices for themselves, and should have access to all the relevant information and support required to do so from the first contact with law enforcement authorities. Pursuant to this obligation:**
  - A. Information should be shared with defendants at all stages of the proceedings, including but not limited to the pre-trial phase, during the trial, and post-trial information.
  - B. **Information on existing support resources and accommodations** for persons with disabilities, as well as on how to access and use them, should be available and clearly communicated to persons with disabilities.
  - C. **An appointment of an intermediary and/or other support person(s)** should be considered and where necessary effectuated, in order to significantly help in communication and ensure that all relevant information is transmitted to and communicated by the defendant.
2. **The police authorities and other justice professionals must ensure that individuals with disabilities understand their rights and all relevant legal procedures and processes.**

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<sup>674</sup> Judicial College (United Kingdom), 'Equal Treatment Bench Book' (February 2021), p 123.

3. **Justice professionals must ensure that at all stages of the proceedings, defendants with disabilities are provided with accessible and understandable information about their rights, including:**
  - A. the right not to incriminate oneself;
  - B. what is likely happen in the applicable legal procedure;
  - C. the rules of places of detention; and
  - D. that they can rely on the support of the public institutions starting with their first contact with the justice system.
4. **When sharing information, the responsible authorities should ensure that it is being communicated in a way that is accessible to the defendant, with regard to their specific communication needs. Language needs to be adapted to the individual communication needs.**
  - A. Justice professionals should have access to a list of concrete tools (including the tools from the International principles) and clear guidance and examples on how to use them to facilitate effective communication with individuals with disabilities.
  - B. Where necessary, information should be presented in a simplified, comprehensible, easy-to-understand format or manner.
  - C. Specifically, justice actors shall adapt the following elements: the speed and tone of delivery, level of vocabulary, level of grammar, and the complexity of questions. While adapting their language, justice actors should also consider the defendants' ability to narrate independently and to understand questions related to time, their orientation and distance, and their level of literacy.<sup>675</sup>
  - D. Ensure the pace of the proceedings is well adjusted – ensure for instance rather short sessions, frequent breaks.<sup>676</sup>
5. **Written information** should be available in alternative formats: justice actors must ensure the elaboration of and provision of access to easy-to-read documents.
6. Responsible authorities should ensure that information about court procedures, including notices that require a response or an action to be taken, including summonses, subpoenas, writs, orders and sentences, is **provided in accessible formats**.<sup>677</sup>

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<sup>675</sup> Access Ability Australia (AAA), The Capital. Social Story, available at [A-visit-to-The-Capital-Social-Story-V1.pdf \(accessabilityaustralia.com\)](#), p. 6.

<sup>676</sup> Justice Intermediary Starter Kit, Module 7 Accommodations, p.5.

<sup>677</sup> Accessible formats include: Sign language; Video and audio guides; Telephone line advice and referral services; Accessible websites; Induction loop, radio or infrared systems; Closed captioning; Braille; Easy Read and plain language; Facilitated communication; and amplification devices and document magnifiers.

7. **Responsible authorities should at all stages of the proceedings ensure that all court processes provide the technical and other support necessary for defendants with disabilities to use any form of communication necessary for their full participation.**<sup>678</sup>

These forms of communication may, among others, require the use of:

- A. assistive listening systems and devices;
  - B. open, closed and real-time captioning, and closed caption decoders and devices;
  - C. voice, text and video-based telecommunications products;
  - D. videotext displays;
  - E. computer-assisted real-time transcription;
  - F. screen reader software, magnification software and optical readers; and
  - G. video description and secondary auditory programming devices that pick up audio feeds for television programs.
8. Responsible authorities should provide communication support, including through third-parties, for example
    - A. note-takers;
    - B. qualified sign language and oral interpreters;
    - C. relay services; and
    - D. tactile interpreters, where and when necessary.
  9. Responsible authorities should provide justice professionals with communication tools to use in communication with persons with disabilities.  
For instance:
  10. The right to interpretation and translation should be fulfilled at all stages of the proceedings. Translators, interpreters, and intermediaries play different roles, but sometimes an intermediary can be helpful in fulfilling the right to interpretation and translation.

*Systemic Recommendations:*

1. The responsible authorities should act to ensure that all **communication support persons** are able to interpret effectively, accurately and impartially, both receptively (understanding what persons with disabilities are saying) and

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<sup>678</sup> These include- Assistive listening systems and devices; Open, closed and real-time captioning, and closed caption decoders and devices; Voice, text and video-based telecommunications products; Videotext displays; Computer-assisted real-time transcription; Screen reader software, magnification software and optical readers; Video description and secondary auditory programming devices that pick up audio feeds for television programmes.

expressively (having the skill necessary to convey information back to those persons), while using any necessary specialized vocabulary, such as legal or medical language, and respecting professional and ethical standards;

2. The responsible authorities should act to **provide for adequate training** on communication tools and methods for all justice professionals, including by ensuring the language barrier is overcome through training of justice actors as well as training on the rights of persons with disabilities of the all other relevant professionals like interpreters and intermediaries.

### **Promising practice**

According to the Australian Disability Access Bench Book, an easy way to avoid this language barrier is to avoid using legal terminology and to use instead concrete and plain language. For instance, the judges and legal representatives should use the verb “to follow” instead of the verb “to comply”. Judges and legal practitioners should also explain particular terms and check during the hearing whether the defendant understands the meaning of specific words.<sup>679</sup>

## **C. Right of access to a lawyer and to legal aid**

### *Practical guidance and recommendations*

1. **The right to access to a lawyer must be guaranteed and facilitated from the outset of detention through the from the pre-trial stages of legal proceedings and processes, before the first actions in criminal proceedings, and throughout the trial. To ensure effective access to legal assistance responsible State authorities should ensure that measures are in place to:**
  - A. **Afford defendants with disabilities the right to legal assistance from the first contact with law enforcement, regardless of the nature of the crime they are accused of, and on terms that are no less favourable than all other persons.**
  - B. **Guarantee that all defendants are informed of their right to have access to a lawyer and effective legal assistance.**
  - C. **Inform persons with disabilities of their right to legal aid – including, where necessary to free effective legal assistance - and other possibilities, such as access to legal representation through civil society organizations.**
  - D. **Maintain and regularly update a list of legal representatives with expertise in disability. These legal representatives should under what are the rights of**

<sup>679</sup> Australian Disability Access Bench Book, available at [Disability Access Bench Book \(judicialcollege.vic.edu.au\)](http://disabilityaccessbenchbook.judicialcollege.vic.edu.au).

persons with disabilities, including under the CRPD, and understand the obligation to provide procedural accommodations for persons with disabilities;

- E. Make procedural accommodations, such as interpreters, assistive technology and intermediaries, or the resources necessary to obtain such accommodations, **available to lawyers** to support effective communication with persons with disabilities in the discharge of their professional duties;
- F. **When a person is detained they must enjoy effective access to a lawyer and legal aid.**

### **Promising Practice**

In Ireland, the National Advocacy Service for People with Disabilities provides communication and assistance services to persons with disabilities. They also help persons with disabilities in instructing a lawyer who represents their will and preferences. In Austria, a similar service is offered by a peer support group (BIZEPS).<sup>680</sup>

### Systemic Recommendations

1. **The right to access to a lawyer must be guaranteed from the time of arrest to pre-trial stages of the proceeding, before the first actions in criminal proceedings, and throughout the trial. Measures should be taken to ensure that:**
  - A. **The public defence system can ensure equal access to lawyers that provide high-quality services to all defendants, including those with disabilities;**
  - B. **Legal assistance is effect and that there is a supervisory mechanism put in place by institutions charged with regulating the bar, such as bar associations and law societies. In doing so emphasis should be put on the lawyers' supportive role, being sufficiently proactive, and maintaining personal and sufficiently frequent contact with clients with disabilities.**<sup>681</sup>
2. **Legal aid must be provided for all persons with disabilities who do not have the means to afford legal assistance,.**

<sup>680</sup> E. Flynn, C. Moloney, J. Fiala-Butora, I. Vicente Echevarria, Report Access to Justice of Persons with Disabilities (2019), available at [CDLP-Finalreport-Access2JusticePWD.docx \(live.com\)](#), p. 18.

<sup>681</sup> FORUM, [Briefing paper on barriers faced by defendants with intellectual and/or psychosocial disabilities in the Criminal Justice System in Czechia](#), Praha, ENABLE project, 2023, p.75.

3. States should guarantee that initial training for lawyers on the rights of persons with disabilities is provided.

## **D. Accessibility of court facilities, information and services**

### *Systemic Recommendations*

1. Responsible authorities should ensure the accessibility of all court facilities, information, communications and other services, including information and communications technology and systems in accordance with the principles of universal design. Ensure all buildings in the justice sector, such as police stations, courthouses, and prosecutorial offices, are accessible to persons with disabilities. In order to achieve this, they should:
  - A. Make adequate financial resources available so that the courts, police stations, prosecutors offices and other physical structures encountered during justice processes are physically accessible to persons with disabilities. This may require the modification of existing buildings and structures as well as a prohibition of any further new buildings or structures being created that are not compatible with the principles of universal design and therefore accessible to all persons with disabilities.
  - B. Guarantee the provision of reasonable and procedural accommodations when facilities and services fail to ensure access to the existing physical environment for all persons with disabilities on an equal basis.
  - C. Accessible buildings and other places should retain their accessibility after their declaration. There are cases where accessible spaces have been converted to other uses due to alleged disuse (e.g. an accessible toilet has become a storage area for cleaning supplies).
  - D. Universal design guides provide specific suggestions, which should be implemented, including ramps, rails, lifts, grooving on the ground, specific parking lots, automatic doors, etc.<sup>682</sup>

## **E. Right to be present at trial and the right to presumption of innocence**

### *Practical guidance and recommendations*

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<sup>682</sup> For specific guidance, please refer to article 2 CRPD – Definition of Universal Design, article 4.f CRPD and Principle 2 of the UN International Principles and Guidelines. See here for instance a guide for designers/engineers, which is being used in a number of universities - [PUD.pdf \(stanford.edu\)](#).

1. **Responsible authorities should take measures to ensure the right to be present at trial and to defend themselves in person, is respected for defendants with disabilities.**
  - A. Any exceptions to the right to be present at trial should not be disability-specific and should apply equally to all persons with disabilities.
2. **Identify and carefully consider for whom the remote hearing might be (un)suitable.**
  - A. If using remote hearings, ensure adequate training, IT tools, and a reliable internet connection for justice actors and equally secure such access on an equal basis to persons with disabilities involved in such proceedings.
  - B. Respect the person's will and preferences on remote hearings. Pursue the "best interpretation of the will and preference" only when the person cannot express them directly.
  - C. **Ensure access to procedural accommodations**, in remote hearings,
    - i. including where applicable, the participation of intermediaries and other support persons;
    - ii. providing that all communication support, including through third parties, (note-takers, qualified sign language and oral interpreters, relay services and tactile interpreters), is equally and effectively available to all persons with disabilities in the context of remote hearings.
  - D. Ensure effective access to a lawyers/ legal aid even in the context of remote proceedings..
  - E. Ensure that during a remote hearing, the role of each person taking part in the online hearing is clear, to all, including to the defendant with disability.
  - F. Ensure the pace of the proceedings is well adjusted – ensure for instance rather short sessions, and frequent breaks.

### Systemic Recommendations

1. The responsible authorities should ensure that all suspects and accused persons with disabilities effectively enjoy the presumption of innocence presumed innocent until proven guilty under the law, including at pre-trial phases

## **F. Procedural rights regarding detention**

*Practical guidance and recommendations*

1. Detention centres must be accessible, and where necessary, support to persons with disabilities must be provided.

**Promising Practice**

In Spain, prisoners and ex-prisoners can benefit from the Plena Inclusion Programme that aims to offer support at all stages: during legal proceedings, in prison, and after the release.

*Systemic Recommendations*

1. Deprivation of liberty should be considered a measure of last resort.
  - a. Community-based alternatives to incarceration should be available to all defendants, including those with disabilities.<sup>683</sup>
  - b. Alternatives to incarceration should be developed and implemented.
2. States must not allow for disability-based detention, institutionalization and other acts that result in disability-related torture and ill-treatment. No one should be detained in any facility on the basis of actual or perceived disability.
3. States cannot use involuntary institutionalization to compensate for the lack of adequate facilities.

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<sup>683</sup> Access to Justice Knowledge Hub, Implementing the Convention on the Rights of persons with disabilities in criminal justice systems, A briefing paper, July 2022, p. 19.